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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1032

RANDOLPH PHILLIPS,

Petitioner,

-against-

JOHN D. MURCHISON,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	8
Relevant Statutes	9
Statement of the Case	10
Reasons for Granting the Writ	
I.	24
II.	27
III.	40
IV.	42
V.	44
VI.	55
VII.	56
VIII.	61
Conclusion	66
Appendix A	1a
Appendix B	46a
Appendix C	57a

Citations

Cases	Page
Alleghany Corp. v. Kirby, et al., 218 F. Supp. 164; 333 F. 2d 327	17, 58
Campbell v. New York Evening Post, 245 N. Y. 320	19, 30, 32
Cowley v. Pulsifer, 137 Mass. 392	27 et seq.
Curtis Publishing Co. v. Butts, 388 U. S. 130	47, 55
Dorr v. United States, 195 U. S. 138	40, 41
Freeman v. Kirby, 27 F. R. D. 395	16, 33
Holt v. Kirby, 384 U. S. 28	5
Hanson v. Krehbiel, 68 Kan. 670	49
Holden v. Pioneer Broadcasting Co., 365 P. 2d 845	42
J. I. Case v. Borak, 377 U. S. 426	61, 64
Lee v. Brooklyn Union Publishing Co., 209 N. Y. 245	44
Linn v. Plant Guard Workers, 383 U. S. 53	56, 57

Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489 — 33, 50, 51

Murray v. Brancato, 290 N. Y. 52 — 59, 60

New York Times Co. v. Sullivan, 376 U. S. 254 — 57

Oglesby v. Cranwell, 250 App. Div. 720 — 30, 33, 50

Park v. Detroit Free Press, 72 Mich. 560 — 42, 47

Post Publishing Co. v. Butler, 137 F. 725 — 48, 36

Pennekamp v. Florida, 328 U. S. 331 — 24, 25

Rosenblatt v. Baer, 383 U. S. 75 — 25, 44, 46

Sanford v. Boston Herald, 318 Mass. 156 — 31

Time, Inc. v. Hill, 385 U. S. 374 — 26, 55

Constiutional Provisions Involved:

First Amendment 8

Fifth Amendment 8

Fourteenth Amendment 8

Relevant Statutes

New York Civil Rights Law, §74 (formerly § 337 New York Civil Practice Act) 9

Securities Exchange Act of 1934, 48 Stat. 895 9

Sec. 14(a) 9

Rule X-14a-9 9

Other Authorities

Gatley, Libel & Slander (1960) 11, 41

Odgers, Libel & Slander (1929) 59, 60

Record citations

The complaint is printed at 5a-45a in Appellant's Appendix and the citation with a page number followed by small "a" refers to that volume for the complaint; otherwise it refers to the opinions of the courts below bound with this petition. Nine copies of the Appellant's Appendix are being filed with the petition.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit insofar as said judgment affirmed the dismissal by the District Court of counts 3 through 11 and 13 & 14 of the complaint.

OPINIONS BELOW

The opinion of the Court of Appeals is appended as Appendix A hereafter (1a) and is reported at 383 F. 2d 370 (2 Cir. 1967). The first opinion of the District Court is appended as Appendix B(46a) and is not reported. The second opinion of the District Court is appended as Appendix C (57a) and is reported at 252 F. Supp. 513 (DCNY 1966).

JURISDICTION

The judgment sought to be reviewed was dated August 23, 1967 and entered on October 20, 1967 (18a), a petition for rehearing being denied on October 19, 1967 by order of that date (20a). Jurisdiction is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Does the Constitution permit unequal "due process of law" protection against defamatory falsehood among the residents of the 50 States, so that in some or all of 43 States a federal or State court defendant is protected against a plaintiff's sending his false, malicious and defamatory pleadings to the newspapers by denying the plaintiff any defense of "privilege" under the rule of Cowley v. Pulsifer, (1884), 137 Mass. 392

(Holmes, J.), while the law of New York as applied by the courts below denies such protection to a federal court defendant as well as any remedy for the publication of the defamatory falsehood?* Which is the correct rule under the Fifth and Fourteenth Amendments to the Constitution of the United States? Insofar as such abuse is of the process of a federal court, is this not a federal question to be decided by "due process" standards and not by the standards of a State "privilege" statute?

2. Does the Constitution permit the degree of protected "freedom of speech" to vary from State to State so that respondent is immune from liability for publication throughout the Nation of his false, malicious and defamatory allegations in 3 civil complaints because the publications originated in New York, but respondent would not be so protected if his publications throughout the Nation originated in some or all of the 43 other States ? Which is the correct Constitutional rule ?

* The statistic as to the number of States is derived from Gatley Libel & Slander (1960), p. 297, and notes 2 & 3.

3. Where respondent, as a part of his proxy contest for control of a public corporation regulated by the Securities and Exchange Commission under the Securities Exchange Act of 1934,

(i) caused Nationwide publication of charges of petitioner's "fraud upon the Courts", "corrupt bargain" and "conspiracy" in three civil complaints; and

(ii) the complaint in one of the actions is struck from the files of the District Court as being in violation of Rule 11, F. R. C. P. which prohibits the filing of "sham and false" pleadings, and as filed by "phantom plaintiffs" without knowledge of their contents whose attorney has been paid for by respondent herein (Freeman v. Kirby et al., 27 F. R. D. 395); and

(iii) a second complaint is ruled res judicata on the same duplicated issues (Freeman v. Kirby et al., NY S. Ct., N. Y. Co., Index No. 13114/1960); and

(iv) the third complaint is alleged to have been unauthorized by the plaintiff in whose name its first count is filed and which charged petitioner with "fraud on the Courts", "corrupt bargain" and "conspiracy", and after substitution of a corporate plaintiff and trial on the merits is

found to be "completely and utterly" failing in proof (Alleghany Corporation v. Kirby et al., 218 F. Supp. 164, 187); * and where

(v) the court below held that with respect to "the publication of the contents of (the) various complaints to various news media... New York's Civil Rights Law § 74," which prohibits any action being maintained against any person for "a fair and true report of a judicial proceeding", "is a good defense to such a situation."; and where

(vi) the court below affirmed the District Court's ruling that the "fair and true report" standard of § 74 did not require respondent, as a condition of being accorded its "privilege" against suit, to make any publication, and respondent failed to make any publication of "a fair and true report" of plaintiff's vindication in the same "judicial proceeding",

has petitioner been deprived of "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt * * * as a basic of our Constitutional system" (Rosenblatt v. Baer, 383 U. S. 75, 86, 92) by the action of the courts below in so construing both §§14(a) and 27 of the Securities Exchange Act and § 74 of New York's Civil Rights Law as to deny him any remedy?

* One aspect of this case not involving petitioner was appealed. (333 F. 2d 327; 384 U. S. 28).

4. Since "malicious utterance of defamatory statements in any form cannot be condoned" and "malicious libel enjoys no constitutional protection in any context" (Linn v. Plant Guard Workers, 383 U. S. 53, 63), did the district court err in holding that the "privilege" to publish "a fair and true report of any judicial proceeding" under Sec. 74, NYCRL was not defeasible by proof of "actual malice" or of "reckless disregard for the truth" (Rosenblatt v. Baer, 383 U. S. 75; Linn, supra; New York Times Co. v. Sullivan, 376 U. S. 254 ?

5. Do the facts as alleged in the 14 counts of the complaint and as re-alleged in their totality in count 14 meet this Court's test of "actual malice" or "reckless disregard of the truth" ?

6. If so, would not the same principles that give a "public official" or a "public figure" a right of action for libel under such circumstances apply to a private person ?

7. Is not the denial of any remedy for publication of defamatory falsehood a deprivation of "due process of law" within the meaning of the Constitution by reason of petitioner having suffered an injury recognized by the law without any available redress?

8. In respect of counts 8 and 13 of the complaint, based on violation of Rule X-14a-9, promulgated by the Securities and Exchange Commission under § 14(a) of the Securities Exchange Act of 1934, which prohibits the circulation of "false and misleading statements" in corporate proxy contests, was the district

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On January 15, 1968 this Court granted the petition for writ of certiorari in No. 517, Amant v. Thompson, a libel action in which the issue of "actual malice" appears to be related to similar issues in this action.

Borak, 377 U. S. 425 because "insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other (libel) counts of the complaint." ? May a second district judge then dismiss the libel counts without reinstating the Securities Exchange Act counts ? May the Court of Appeals thereafter affirm the dismissal of the Securities Exchange Act counts without giving any reason therefor ? Is this not a denial of its duty to this Court to make clear

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7. Is not the denial of any remedy for publication of defamatory falsehood a deprivation of "due process of law" within the meaning of the Constitution by reason of petitioner having suffered an injury recognized by the law without any available redress?

8. In respect of counts 8 and 13 of the complaint, based on violation of Rule X-14a-9, promulgated by the Securities and Exchange Commission under § 14(a) of the Securities Exchange Act of 1934, which prohibits the circulation of "false and misleading statements" in corporate proxy contests, was the district court correct in finding that "plaintiff has alleged no facts sufficient to show any damage resulting to him personally by reason thereof" when the complaint in fact re-alleged the statements in the final omnibus claim (count 14) and further alleged they were part of "a continuing conspiracy... maliciously to defame plaintiff", "injured him in his reputation", "deprived him of earnings" and caused "plaintiff's appointment" as "consultant" to be terminated" ?

9. May a district court deny a plaintiff a private right of action for violation of Rule X-14a-9 under the Securities Exchange Act of 1934, as upheld by this Court in J. I. Case v. Borak, 377 U. S. 425 because "Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other (libel) counts of the complaint." ? May a second district judge then dismiss the libel counts without reinstating the Securities Exchange Act counts ? May the Court of Appeals thereafter affirm the dismissal of the Securities Exchange Act counts without giving any reason therefor ? Is this not a denial of its duty to this Court to make clear

its reasons for its actions, not to mention its duty to appellant, and to the bar which must be guided by its precedents?

10. In affirming dismissal of the malicious prosecution and malicious abuse of process claims and the libel claims alleged in count 14, which re-alleged all the facts in the prior counts, did the court below correctly apply the law of New York and of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law * * * abridging the freedom of speech, or of the press;"

Amendment V

" * * * nor shall any person * * * be deprived of * * * property, without due process of law;"

Amendment XIV

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Relevant Statutes

SECTION 337 OF THE NEW YORK CIVIL PRACTICE ACT

"A civil action cannot be maintained against any person, firm or corporation for the publication of a fair and true report of any judicial proceeding, legislative proceedings, or other official proceeding or for any heading of the report which is a fair and true headnote of the statement published." (now Section 74 C. R. L.)

SECTION 14 OF THE SECURITIES EXCHANGE ACT OF 1934

"Sec. 14.(a) It shall be unlawful for any person by the use of the mails * * * or otherwise to solicit any proxy * * * in respect of any security * * * registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." (15 USCA 78n) (48 Stat. 895)

RULE X-14A-9 OF REGULATION X-14 UNDER SECURITIES EXCHANGE ACT OF 1934

"No solicitation subject to this regulation shall be made by means of any proxy statement * * * or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading * * *." (17 C. F. R. § 240.14a-9)*

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* Includes "(b) Material which... impugns personal reputation, or makes charges (of) illegal conduct... without factual foundation." 17 C. F. R. § 240.14a-9, note. (Our emphasis)

Statement of the Case

The defamatory publications

As Judge Ryan stated in his opinion (57a):

"No question is presented as to the defamatory nature of the statements pleaded in the complaint.[2]

"[2] In short, and bluntly put, it is charged that for a price, Phillips sold out to Kirby and betrayed the interests of those he purported to represent, in advocating the acceptance of a separate settlement with Kirby for $1,100,000 when he knew the latter's liability in the lawsuits had been evaluated at $35,000,000, and that the sum of $1,100,000 was considerably less than Kirby would have had to pay in settlement except for the alleged corrupt conduct; that the conspiracy encompassed the lifting of the injunction of this Court, as well as the entry of an order of dismissal as to Kirby, which were achieved by the concealment of his alleged duplicitous conduct from both courts.' *Murchison* v. *Kirby*, 27 F. R. D. 14, 17 (1961)." (61a)

In paragraph 55 of his Answer to the Amended and Supplemental Complaint (R. 334) defendant "Admits that on or after September 8, 1960, Hill & Knowlton, Inc., acting on behalf of defendants, issued from its New York City office a written statement, a copy of which is annexed as Exhibit B to the Complaint . . ." The statement is headed: "For: Murchison Brothers For IMMEDIATE RELEASE: THURSDAY, SEPTEMBER 8, 1960."* It states:

* Defendant admits in the affidavit of press agent Richard Cheney appended to his moving papers that the press release was distributed "to the financial editors of the New York metropolitan

"John D. Murchison, Clint W. Murchison, Jr. and Gerard L. Fossland today (September 8) charged Allan P. Kirby, Charles T. Ireland, Jr. and other Alleghany Corporation directors, as well as Randolph Phillips, with conspiracy to defraud the U. S. District Court, the New York Supreme Court, and Alleghany Corporation.

The complaint, filed in the U. S. Southern District Court, alleges that Kirby, Phillips and Ireland agreed to a secret arrangement to reward Phillips with a directorship in Investors Diversified Services for helping Kirby get rid of his liabilities through a separate settlement of a series of lawsuits brought in behalf of Alleghany Corporation.

The complaint charges that Kirby, using Phillips, negotiated a secret settlement to suits brought by Alleghany shareholders, after Kirby was informed by his counsel that his liability in such suits might run in excess of $35,000,000. It also alleges that Kirby was influenced by the fact that certain stockholders of Alleghany (other than the Murchisons) were accumulating Alleghany shares in contemplation of a proxy contest for control of the holding company.

The complaint alleges that Phillips agreed to settlement in the suits in return for: 'a position of prominence as a director or officer of I. D. S., Alleghany or one of its affiliates;' (Phillips is now a director of I. D. S.) 'a substantial voice in the management and

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dailies, the Daily News, Times, Herald Tribune, Daily Mirror, Post, Journal American, World-Telegram & Sun and the Wall Street Journal, to the wire services (UPI and AP) and to the PR news wire." He also admits that the press release was "prepared" *prior* to the filing of the complaint (R. 451, 492, 493) (77a-78a).

operation of I. D. S. and Alleghany;' and a job as 'a salaried consultant to Alleghany or one of its affiliates.' (Phillips is now on the payroll of I. D. S. as a consultant at $2,500 monthly.)"

All the defamatory publications complained of included some or all of the above statements (70a-73a).

Paragraph 55, which is repleaded under the 9th Count, alleges the issuance of the above press release "to newspapers and wire services in the State of New York and elsewhere in the United States, and to individuals in the State of New York and elsewhere in the United States, through the use of the mails and otherwise." (19a-22a)*

Appellant's unpublicized "vindication"

The action *Murchison* v. *Kirby,* which was the subject of Judge Weinfeld's decision (27 F. R. D. 14) above quoted, became *Alleghany Corporation* v. *Kirby,* 218 F. Supp. 164. Final judgment dismissing this action as to appellant Phillips was entered on June 5, 1963. As Judge Moore stated in giving the background of that part of the action which continued against defendant Allan P. Kirby on a claim not alleged against Phillips:

"The district court found that appellant had failed completely to establish any fraud in which Kirby and Phillips were involved in connection with the ultimate settlement. No appeal has been taken from this finding." *Alleghany Corporation* v. *Kirby,* 333 F. 2d 327.

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* "Of course the delivery of the release to the newspapermen was publication in and of itself." *Munafo* v. *Helfand,* SDNY, 140 F. Supp. 234, 237-8. (Weinfeld, *J.*)

Paragraph 78 of the Amended & Supplemental Complaint herein alleges:

> "78. At no time did defendants herein cause a press release to be issued publicizing this decision (218 F. Supp. 164) of this Court, nor communicating the decision of this Court to those newspapers which had reprinted defendants' press release." (25a)

Defendant John D. Murchison in his Answer admits the allegations of paragraph 78 as follows:

> "78. Admits the allegations of paragraph 78 of the Complaint, but denies the implication that defendant was under any duty to perform any of the acts alleged." (R. 330)

The Amended & Supplemental Complaint **(5a)(R. 261-297)**

Counts 1, 2 & 3 allege that the acts complained of constituted a conspiracy maliciously to use the process of the court, or to abuse its process, and maliciously to violate Rule 11 of the Federal Rules of Civil Procedure in the institution and prosecution of *Freeman* v. *Kirby*, 27 F. R. D. 395 and *Alleghany Corporation* v. *Kirby*, 218 F. Supp. 164 insofar as they related to Randolph Phillips, plaintiff-appellant herein, who was a defendant in both actions as well as in a duplicate *Freeman* action in the State court. (5a-11a)

Counts 4 & 5 allege that draft complaints against Phillips in the names of "phantom plaintiffs"—one "Klafter" in the 4th Count and an unidentified person alleging the First Count of a so-called "Murchison complaint—constituted libelous publications by the defendants John D.

Murchison and his brother Clint W. through their attorneys to one Jesse Holland. (11a-12a)

Sixth Count. The facts alleged in this Count show (a) the publication to a printer of the complaint set forth in "the printer's proof of a draft complaint, dated September 1, 1960" in *Murchison* v. *Kirby*, 60 Civil 3511 (par. 7 realleged in par. 35). This is "the printer's proof of the Murchison complaint" referred to by Judge Bicks in *Freeman* v. *Kirby*, 27 F. R. D. at 397); (b) the filing of a *printed* complaint in the Court on September 8, 1960 in 60 Civil 3511 (par. 7 realleged in par. 35); and (c) the utterance of a slander to and the publication in the Wall Street Journal of a libel on September 7th and 8th, 1960. (R. 51-53) (13a-15a)

Seventh Count. The facts alleged in this Count are the same as for the Sixth except publication was made in The New York Herald Tribune, on September 7th and 8th, 1960. (pp. 10-12) (R. 53-55) (15a-18a)

Eighth & Thirteenth Counts. These allege defamations by publication of a 2-page "press release" dated September 8, 1960 (18a-21a) and a 17-page leaflet dated March 17, 1961 (30a) in violation of SEC rules. (29a-31a)

Ninth Count. This alleges the publication of a defamatory press release "throughout the United States" on September 8, 1960. (pars. 67, 68, 71). (R. 60-61) (22a-25a)

Tenth Count. Alleges publication in The New York Times and The New York World-Telegram on September 9, 1960. (par. 31) (25a)

Eleventh Count. Alleges publication in the Minneapolis Morning Tribune of September 9, 1960. (pars. 86, 89). (R. 64-65) (26a-28a)

Twelfth Count. This alleges a defamation by the publication of certain paragraphs in the *Murchison* v. *Kirby* complaint, SDNY, 60 Civil 3511 on or about September 13, 1960 in Minnesota, Ohio, Illinois, Delaware and Canada to 14 named individuals residing in those places. (pars. 92 and 93) (R. 65-66) (28a-30a)

Fourteenth Count. Realleges all prior counts as a conspiracy. (31a)

The proceedings in the District Court

The complaint was filed on February 27, 1961. Jurisdiction was asserted by reason of diversity of citizenship and as to counts 8, 13 and 14 under the Securities Exchange Act of 1934. (48 Stat. 895). On January 28, 1964, after the trial and dismissal of Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et ano., 218 F. Supp. 164, an amended and supplemental complaint was filed alleging petitioner's vindication therein, among other matters.

On February 17, 1964 respondent moved for dismissal under Rule 41(b), F. R. C. P. or in the alternative for dismissal of some of the 14 counts for failure to state a claim upon which relief can be granted. On May 8, 1964 Judge Dawson granted the motion to the extent of dismissing for failure to state a claim counts 1, 2, 3, 4, 5, 8, 13 & 14 and denied the motion as to counts 6, 7, 9, 10, 11 & 12. (46a-56a)

On November 2, 1965 respondent moved for summary judgment under Rule 56(b), F. R. C. P. dismissing counts 6, 7, 9, 10, 11 & 12. Judge Ryan granted the motion in all respects on March 28, 1966. Final judgment dismissing the complaint was filed and entered the same day.

The proceedings in the Court of Appeals

By opinion filed August 24, 1967 the Court of Appeals (per Waterman, C. J. and Feinberg, C. J., Moore, C. J. dissenting) reversed the judgment below dismissing counts 1, 2 & 12. In affirming the dismissal of the remaining counts the court was unanimous.

On October 19, 1967 the court denied petitioner's petition for rehearing, having previously denied appellee's petition for rehearing en banc.

The prior adjudications that the Freeman complaints were "sham and false" and filed by "phantom plaintiffs", striking the federal complaint for violation of Rule 11, F. R. C. P.

The federal decision to that effect is reported in Freeman v. Allan P. Kirby, Randolph Phillips et ano., 27 F. R. D. 395 (SDNY 1961).

The dismissal of the duplicate State Freeman complaint on the grounds that 27 F. R. D. 395 made the issues on the merits and as to "sham and false" res judicata is not reported but was made by order dated August 7, 1964 (R. 500)

Murchison's complicity in these matters by his attorneys was therein adjudicated. 27 F. R. D. at 396-398. The attorney Holland who signed the "sham and false" pleadings and found the "phantom plaintiffs" (Id.) was paid $30,000 by Murchison. (R. 429)

The prior adjudication that the defamatory publications by the Murchisons and their attorney Holland were "apparently intended to affect the voting in the proxy contest for control of the (Alleghany) Corporation."

As stated by the late Judge Dawson in Alleghany Corporation v. Kirby et al. (formerly Fossland, Murchison v. Kirby et al.), 218 F. Supp. 164: *

* Judge Dawson found that with respect to the allegations concerning petitioner that plaintiff "has failed completely to establish" the alleged "fraud on the court", "corrupt bargain" and "conspiracy." (218 F. Supp. at 182)

"• • • Although brought as a suit in equity, it appears to be but another skirmish in the battle of tycoons (the Murchison Brothers of Texas on one side, and Allan P. Kirby of New Jersey on the other) for control of a rich plum—Alleghany Corporation. With the advantage of great wealth on both sides, and the logistical support of battalions of lawyers and squads of publicity men, the parties have ranged around the country using to the full the broad discovery processes of the Federal Rules. Over 20,000 pages of pre-trial depositions were taken . . .

"• • • It is interesting that the action was started almost coincidentally with the institution of a proxy fight by the Messrs. Murchison against Mr. Kirby for control of Alleghany Corporation, and the filing of the suit was hailed with a great flurry of publicity apparently intended to affect the voting in the proxy contest for control of the corporation. The proxy fight was successful . . ." (218 F. Supp. 164, 167)

The District Court's affirmed ruling on "malice"

" The question of malice, a true question of fact, does not defeat the privilege; its resolution therefore even if pleaded is not necessary to an application of the privilege (Kelley v. Hearst Corp., 2 A. D. 2d 480, 157 N. Y. S. 2d 498; Farrell v. New York Evening Post, 167 Misc. 412, 3 N. Y. S. 2d 1018 (Sup. Ct. N. Y. Co. 1938))." (70a)

The District Court's affirmed ruling that the "privilege" attaches once the complaint has been either "served" or "filed"

" It cannot be disputed (and plaintiff conceded this) that an action of the nature here involved is commenced in the New York State court by the service of the summons upon any one defendant, and in the Federal court "[a] civil action is commenced by filing a complaint with the court." (Rule 3 F. R. Civ. P.). The filing of the complaint in the *Freeman* suit in the State Court, and the service of a defendant with process in the Murchison suit in the Federal court is not required in the establishment of the pendency of a judicial proceeding. Once the pendency of the judicial proceedings has been established the privilege attaches irrespective of whether the proceedings were public knowledge or known to plaintiff. (Campbell v. New York Evening Post, 245 N. Y. 320, 157 N. E. 153, 52 A. L. R. 1432)." (64a)

The District Court's affirmed ruling that respondent's failure to report petitioner's vindication did not make the privilege of printing the defamatory pleadings defeasible.

"Plaintiff's other argument is that the privilege is defeasible because defendant failed to publish his subsequent vindication, and that the report therefore was not full, fair or impartial.

The report here was co-extensive with the judicial proceeding—only the complaints were then in existence and that is what was reported. It was as complete as could be and that is when the privilege attached, not years later; it was not destroyed because the charges ultimately were not sustained. Dismissal of the charges did not render the charges in the complaint non-existent as a record in a judicial proceeding. George v. Time, Inc., supra; Campbell v. New York Evening Post, supra. There is no principle of law which so eradicates the privilege which has attached because of subsequent events." (74a-75a)

The District Court's affirmed ruling that the "privilege" applies to a party who circulates his own complaint.

"Plaintiff finally urges that the privilege does not apply to the Murchison action because the publication was by Murchison a party to the complaint. But, the statute immunizes "any person" including parties to the litigation (Lewis v. Chemical Foundation, 262 N. Y. 489, 188 N. E. 33; Robinson v. Battle, 148 App. Div. 230, 133 N. Y. S. 57; Oglesby v. Cranwell, 250 A. D. 720, 293 N. Y. S. 67)." **(75a)**

The District Court's affirmed ruling that no claim was stated under Sec. 14(a) and 27 of the Securities Exchange Act of 1934, which prohibits the solicitation of proxies by means of "false and misleading statements". (Rule X-14a-9)

"*Alleged Violations of the Securities Act* *

Counts 8 and 13 appear to claim damages for violations of the Securities Act, although it is difficult to ascertain from a reading of the complaint exactly what the contentions of the plaintiff are with reference to these counts. Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other counts of the complaint. Insofar as the counts may allege violations of the Securities Act, or the rules and regulations thereunder, plaintiff has alleged no facts sufficient to show any damage resulting to him personally by reason thereof. The meetings of stockholders concerning which proxies were solicited have been held. He did not seek to enjoin the use of the proxies or to enjoin the holding of the meetings or the action taken thereat. For him to wait and now seek personal damages for alleged violations of the Securities Act is not justified. If there were any violation of the proxy rules, such violation cannot be said to be related in any way to the damages sought to be recovered by the plaintiff. *Cf., Mills* v. *Sarjem Corporation,* 133 F. Supp. 753, at p. 768 (D. C. N. J. 1955).

The motion to dismiss counts 8 and 13 of the complaint for failure to state a cause of action is granted.

So ordered." (55a-56a)

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* Counts 8 and 13 are not alleged under the Securities Act but under the Securities Exchange Act of 1934. (R. 261, pars. 54 & 96)

The decisions of the Court of Appeals and District Court are singular for failure to cite a single one of the 1964-1967 libel decisions of this Court nor to discuss or apply J. I. Case v. Borak, 377 U. S. 425 (1963) which upheld a private right of action for violation of the S. E. C. proxy rules under the Securities Exchange Act of 1934.

Petitioner cited to the Court of Appeals all of the cases on libel in this Court from 1964-1967. (Reply brief, pp. 1-11, 29-30)

He also brief in extenso the application of Borak to the facts herein. (Id., pp. 1-11)

Yet the court below failed to articulate a single reason for not applying these cases to the facts before it.

As petitioner shows hereafter these cases are controlling and require reversal of the judgment dismissing counts 3 through 11 and 13-14.

REASONS FOR GRANTING THE WRIT

I.

The rule adopted by the court below permits the degree of protected "freedom of speech" to vary from State to State so that respondent is immune from liability for publication throughout the Nation of his false, malicious and defamatory allegations in 3 civil complaints because the publications originated in New York, but a similar respondent would not be so protected if his publications throughout the Nation originated in some or all of the 43 other States. Pennekamp v. Florida, 328 U. S. 331 requires that the writ be granted so that :

"The standards that set the scope of its principles cannot therefore be such that 'the constitutional limits of free expression in the Nation would vary with State lines.' (Rosenblatt v. Baer, 383 U.S. 75, 84 citing Pennekamp.

As we show hereafter, as a result of the decision below, the degree of protected "freedom of speech" varies from State to State in the following respects:

(i) in New York and 6 other States a defamer is protected by "privilege" if he sends his pleadings to the newspapers prior to any action by the court thereon. In some or all of the 43 other States he is denied such protection.

(ii) in New York a defamer's freedom, including a newspaper's, to report the derogatory parts of a judicial proceeding is not conditioned upon his making a subsequent report of "the further proceedings which vindicate the person defamed." In a memorandum below, respondent conceded this "may have been the rule in some, or even a majority of American jurisdictions, but it is not the rule in New York." We have been unable to find a single case in

which this rule has been abolished in other jurisdictions.

(iii) in New York the "absolute privilege" to make "a fair and true report of a judicial proceeding" is not defeasible by proof of malice, according to the district court, as affirmed by the court below. This not only varies with the rule in most other jurisdictions, but appears to conflict with this Court's rule that "malicious utterance of defamatory statements in any form cannot be condoned" and "malicious libel enjoys no constitutional protection in any context." (Linn v. Plant Guard Workers, 383 U. S. 53, 63).

(iv) in New York a defamer in the guise of making "a fair and true report" of "a judicial proceeding" is granted the "absolute privilege" of circulating the defamatory falsehoods in his complaint. Yet

> "This Court has never held that the press has an absolute privilege to publish falsity." (Time, Inc. v. Hill, 385 U. S. 374, 410, note 8, Opinion of Harlan, J.)

These variations in the degree of protected "free expression" are so substantial as to require that pursuant to Pennekamp the writ be granted so that the protected area of "free expression" may be made uniform throughout the Nation.

II.

Mr. Justice Holmes in Cowley v. Pulsifer (1884), 137 Mass. 392, stated: "It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity." (p. 394) "A contempt of court cannot be privileged and we see no reason to doubt that an action could be maintained for such a publication" citing English Chancery " 'if the party publish his bill abroad, the said bill being false.'" (p. 396). Most of the 50 States follow this rule. (Gatley, Libel & Slander, p. 297, notes 2 & 3)

Respondent stated in the court below in response to petitioner's reliance on Cowley:

> "First. * * * Cowley was decided on the ground that the pleadings which were reported were 'not open to the public.' (137 Mass. at 396). The contrary is true here.
>
> Second. * * * Gately on Libel & Slander * * * does state that publication of pleadings in a newspaper will be 'treat(ed) as a contempt of court'. If that were all Gately said on the subject, we would be obliged to point out that Gately is a treatise on English not New York libel law. But, the Gately book itself (footnote 67, p. 174 takes the trouble to refer the American readers to page 297 where it is stated that the English rule is not followed in New York, California, Kentucky, Nebraska, Oregon, South Carolina and Wisconsin. (Op. Ct. p. 297 fn. 2)"(Appellee's Brief, pp. 26-27)

Thus respondent confirms that some or all of the 43 other States do not follow the New York rule. Here also the Freeman complaints were not "open to the public" at the time of the publication of their defamatory falsehoods, and respondent only showed "service" of them and no "filing" prior to publication. (62a) Conversely with respect to the Fossland-Murchison complaint filed in the district court he merely

showed that "he filed the complaint in this Court on September 8, 1960 sometime before 4:30 P. M." (62a) whereupon the "press release" immediately issued all over the Nation. There was no showing below that this "filed" complaint was "open to the public" at the time of publication; indeed it would have been clerically impossible for it to go through the routine of the clerk's office and thereafter transmitted to the public docket file in such a matter of minutes as occurred here. It was also shown that no "service" of the complaint had been made prior to publication (62a). Thus the Murchison complaint was not even "open to" the public inspection of the defamed petitioner and due to the lateness of filing could not have been inspected even by him until the next day.

But petitioner presses the attention of this Court not upon these technical issues, but to the substantive "due process" and "equal protection" guarantees that underlie the Cowley v. Pulsifer rule, and which now have been destroyed by the courts below without even a discussion in their opinions of the issue.

Neither this Court nor New York's highest court has ever passed on this issue. But admittedly "disregarding the overwhelming weight

of authority elsewhere" New York has ruled that a newspaper, as distinct from a party plaintiff, is privileged under § 337 New York Civil Practice Act (now § 74 New York Civil Rights Law) to publish the pleading "on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings." Campbell v. New York Evening Post, 245 N. Y. 320, 328 (1927). The rationale of the Court was:

> "We cannot go back and exclude the publication of daily reports of trials before a final decision is reached." (p. 328)

The courts below refused to apply the Cowley v. Pulsifer rule and did not regard the issue as one of according petitioner "fair play" which "is the essence of due process" Galvin v. Press, 347 U. S. 522, 530, although it seems indisputable that Constitutional "due process" was at the root of Mr. Justice Holmes' reasoning in Cowley. Instead the court below found that "New York Civil Rights Law § 74 is a good defense to such a situation. Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489 (1933); Oglesby v. Cranwell, 250 App. Div. 720, 293 N. Y. Supp. 67 (2d Dep't 1937)." (A-6)

The States of Michigan, Minnesota, Iowa, Massachusetts, Rhode Island, Colorado, and Pennsylvania are among the jurisdictions that follow the Cowley v. Pulsifer rule.

Without exhausting the citations to this effect, we list Nixon v. Dispatch Publishing Co. (1907), 101 Minn. 309, 112 N. W. 258; a jurisdiction where one of the libels complained of herein was published. (26a-27a); Sanford v. Boston Herald (1945), 318 Mass. 156, 61 N. E. 2d 5; Pittsburgh Courier Publishing Co. v. Luhore (1952), 200 F. 2d 355 and cases cited; Park v. Detroit Free Press, (1888), 72 Michigan 560; Isley v. Sentinel Co. (1907), 133 Wisconsin 20; Flues v. New Non-Pareil Co. (1912), 155 Iowa 290; and Meeker v. Post Printing Co. (1913), 55 Colorado 355.

These cases show that not even a newspaper is given the "privilege" of reporting merely a pleading filed by one party. A fortiori these jurisdictions do not give the "privilege" to a plaintiff whose self-publication serves no public policy purpose but in Mr. Justice Holmes' words is not "a suf-

ficient foundation...for scattering any libel broadcast with impunity." (137 Mass. at p. 394)

In none of the 6 States that apparently follow the rule in Campbell v. New York Evening Post, 245 N.Y. 320 (1927) is there a reported case extending it to a self-publicizing plaintiff's report of his own defamatory complaint.

The States that follow the Campbell rule, according to Gatley, supra, p. 297, note 2, are limited to California, Kentucky, Nebraska, Oregon, South Carolina and Wisconsin.

Petitioner has been unable to find a single reported case outside the case below that extends the Campbell rule to letting a "party publish his bill abroad, the said bill being false." (137 Mass. at p. 396).

Thus if the present case is based on a correct exposition of New York law by the court below, it is a unique law that is not followed in any other jurisdiction. *

* Gatley in *Libel & Slander* (1960) states "he (a litigant) is not privileged if he sends his pleading to a newspaper for publication" and loses thereby both his "absolute" and "qualified" privilege (note 67, p. 174). His publication is "a contempt of court". *Gaskell & Chambers* v. *Hudson* (1936), 2 K. B. 595, 603-604. " 'A contempt of court cannot be privileged'. Cowley v. Pulsifer, 137 Mass. 392." *Stevenson* v. *News Syndicate Co.*, 276 App. Div. 614, aff'd 302 N. Y. 81 (1950).

Neither of the two cases cited by the court below as its authority raised the Constitutional "due process" issue, nor came within the facts of the Cowley v. Pulsifer rule.

In neither Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489, nor Oglesby v. Cranwell, 250 App. Div. 720 was there an adjudication, as here, that the defamatory matter was "sham and false" (Freeman v. Allan P. Kirby, Randolph Phillips et ano., 27 F. R. D. 395 (DCNY 1961); nor "completely and utterly" failing in proof (Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et ano., 218 F. Supp. 164, 187). *

Thus falsity, an indispensable ingredient of the Cowley v. Pulsifer rule (137 Mass. at 396), was in effect ruled beside the point by the lower court's reliance on Lewis and Oglesby.

* Two years after publication of the defamatory matter the complaint was amended to substitute Alleghany Corporation for the Fossland-Murchison plaintiffs (218 F. Supp. at 167). Thereafter, upon dismissal, an appeal of one aspect of this case not involving petitioner was taken. (333 F. 2d 327; 384 U. S. 28)

The decision below fails to shows that Lewis related to a party who "merely republished the 'fair and true report')of testimony given in court "by mailing copies of the newspaper" story thereof "to many persons." * Williams v. Williams, 27 App. Div. 550 (2d Dep't 1966). In Oglesby, there was no adjudication that the allegations in the complaint were false - an essential element in the application of the Cowley v. Pulsifer rule (137 Mass. at p. 396). In addition, the defendant there, unlike the duty imposed on respondent here by the court below, or rather lack of duty, was required to show that in writing a story of his fraud complaint for the newspapers he had acted "in good faith and without malice." Williams, supra.

Finally, and most importantly, neither of these two cases relied upon by the court below raised as petitioner did below the "gut" issue of Constitutional "due process."

* The defendant also pleaded that he acted "without actual malice" and this plea was held "good as against a motion to strike out, even though the report is published through the efforts or at the suggestion of pleader." Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489". Oglesby, 250 App. Div. 720.

The Cowley v. Pulsifer rule is rooted in the strong ground of both substantive and procedural "due process" as guaranteed by the Fifth and Fourteenth Amendments while the New York rule, if correctly expounded by the court below, deprives petitioner and all future litigants who may be the victims of defamatory falsehood in a complaint that is published by the plaintiff, of both substantive and procedural "due process" as guaranteed by the Fifth and Fourteenth Amendments, and no consideration of public policy or welfare is served by such an extension of "privilege" to make "a fair and full report of a judicial proceeding".

Privilege statutes have uniformly been enacted to serve the public purpose of the First Amendment guaranty of a free press and to encourage justice to be performed in the daylight so as to insure its fairness.

Neither of these urgencies apply to the publication by a private person of his own complaint's defamatory falsehoods prior to the time a court has acted upon them or even, as here, received the defendant's answer.

What public policy or constitutional imperative or reason of justice can support such a policy of premature disclosure of defamatory falsehood? And then immunize the act from all liability? Clearly Mr. Justice Holmes was right in refusing to countenance such a rule.

Cowley v. Pulsifer by upholding a right of action in such circumstances was upholding the Fifth Amendment's guaranty of "due process", a guaranty that accords to every man a remedy for a legal injury. "A man is entitled under the Constitution to a trial by jury, but he may waive it. So he is entitled to a remedy at law for an injury to his reputation..." Post Publishing Co. v. Butler, 137 F. 725, 727, and cases cited. Holden v. Pioneer Broadcasting Co., 365 P. 2d 845 (Oregon, 1961) (pp. 855-857 and cases cited. *

* See Mr. Justice Stewart's statement in Rosenblatt v. Baer, 383 U.S. at p. 92 that "The right of a man to the protection of his own reputation from unjustified invasion" is "a basic of our Constitutional system."

And Cowley v. Pulsifer upholds the procedural decencies by not allowing the "due process" of either a federal or State court to be the vehicle for "scattering any libel broadcast with impunity." Certainly an abuse of that "process" is an abuse of the "due process" whose protection is guaranteed under the Fifth and Fourteenth Amendments to every party plaintiff and defendant in either a federal or State court.

Yet the courts below without even vouchsafing their reasoning have refused to follow Cowley v. Pulsifer, apparently under the misconception that there is merely at issue herein a traditional Erie v. Tompkins problem of State law. But as we show hereinafter there is not a single case under New York law that denies a cause of action for a defamatory falsehood's publication by a self-publicizing plaintiff's circulation of the charges in his own complaint. In the single case relied on by the Court below where a plaintiff sent his pleadings to a newspaper, the decision merely held that he had a good defense if he could prove he acted in good faith and without malice. At that point there had of course been no adjudication of falsehood. (Oglesby v. Cranwell, 250 App. Div. 720, 293 N. Y. Supp. 67 (2d Dep't 1937).

The sole answer of respondent to these issues in the court below, and the one that we must assume was persuasive in view of the court's silence thereon, was

> " * * * It has long been established that reputation is not 'property' protectable under the Constitution. Abbott v. National Bank of Commerce, 175 U. S. 409, 414 (1899) * * *
>
> In any event, the short answer * * * is found in American Wells Works Co. v. Layne & Bowler Co., 241 U. S. 257, 260 (1916).
>
> > 'The state is master of the whole matter, and if it saw fit to do away with actions of this type (defamation) altogether, no one, we imagine, would suppose that they still could be maintained under the * * * laws of the United States.'"

Mr. Justice Stewart has given the answer to Abbott in Rosenblatt v. Baer, supra, "The right of a man to the protection of his own reputation from unjustified invasion" is "a basic of our Constitutional system." (383 U. S. at p. 92). The "short answer" to American Wells Works is that New York has not done away with libel actions and thus must decide them pursuant to Constitutional standards.

Whether the rule of the majority of the States who protect a federal and State court defendant against a plaintiff's sending his false and defamatory pleadings to the newspapers by denying him "privilege", or the rule of New York as now expounded by the courts below which denies such protection to a federal or State court defendant, is the correct rule is a question of importance under the Fifth and Fourteenth Amendments to the Constitution that has not been decided but should be decided by this Court.

We assume, arguendo, that Dorr v. United States, 195 U. S. 138, 151-152, as quoted, infra, did not decide the basic issues herein. If it did, summary reversal on that authority of the courts' dismissal below of the libel counts would be justified.

III.

The failure of respondent "after reporting derogatory parts" of a judicial proceeding "to publish the further proceedings which vindicate(d)" petitioner requires a court to deny the plea of "privilege" in the publication of the defamation. Restatement of the Law, Torts, § 611 (1938 ed.); Dorr v. United States, 195 U. S. 138, 151-152.

In Dorr this Court stated:

"The privilege extends to a full and fair report of judicial proceedings without prejudicial comment. The rule is nowhere better stated than by Judge Cooley in his work on Constitutional Limitations, 7th ed., p. 637: '* * * But it is said that if *a party* is to be allowed to publish what passes in a court of justice, *he must publish the whole case,* and not merely state the conclusion which he himself draws from the evidence.'" (Our emphasis)* (pp. 151-152)

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* Petitioner has been unable to find any other case where a court has ruled that "a fair and true report" does not require publication of the defamed person's vindication if the defamation has been published.

Restatement of the Law, Torts states at § 611 (1938 ed.):

"*Reports of Judicial* * * * *Proceedings*

"* * * * However when a newspaper publishes from day to day the report of a judicial proceeding, *it may not* after reporting derogatory parts, *fail to publish the further proceedings which vindicate the person defamed.*" (Our emphasis) (p. 295)*

In the courts below respondent claimed the Restatement rule "may have been the rule in some, or even a majority of American jurisdictions, but it is not the rule in New York." If this is so, then the New York rule does not conform to the standards for a privileged "full and fair report of judicial proceedings" stated by this Court in Dorr, supra.

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* *Restatement of the Law, Torts, Second,* preliminary draft dated April 22, 1960, pp. 84-85, proposes no change in this provision of §611. Nor does Tentative Draft No. 12, dated April 27, 1966, pp. 118-119 where the Reporter notes that proposed revisions of §§606-618 should "await a number of questions left unanswered by the case of *New York Times Co.* v. *Sullivan* (1964), 376 U. S. 254." He thereafter mentions questions under §§607, 608, 609 and 610. At no point is the above statement in §611 indicated as open to question.

Gatley on *Libel & Slander,* the most modern British text, states:

"§514. * * * A report which accurately sets out one part of the proceedings and omits another which gives a different complexion to the whole case will not be privileged. Turner v. Sullivan (1862), 6 L. T. (n. s.) at p. 131" (p. 289).

IV.

At least 8 States have declared unconstitutional under the "due process" and "equal protection of the law" guarantees of the Fifth and Fourteenth Amendments statutes that deny general damages for defamation, because they allow an injury without effective remedy for the wrong done a defamed person.

> "The constitutionality of (retraction) statutes * * * has been passed upon in other states. In a majority of the cases in which the question has been raised the courts have held, or stated in dicta, that the denial of the remedy of general damages for defamation is unconstitutional." *Holden* v. *Pioneer Broadcasting Co.*, 365 P. 2d 845 (Oregon, 1961). (pp. 855-857)

Holden cites *Byers* v. *Meridian Publishing Co.*, 84 Ohio St. 408, 95 N. E. 917, and the landmark cases of *Hanson* v. *Krehbiel,* 68 Kan. 670, 75 P. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422; *Park* v. *Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544, approved in *McGee* v. *Baumgartner,* 121 Mich. 287, 80 N. W. 21, 22. Other jurisdictions by divided courts have held that statutes permitting the publication of a retraction in place of

general damages and allowing only special damages satisfy "due process" and "equal protection" by giving an adequate legal remedy for the injury. *Werner* v. *So. Calif. Assoc. Newspapers,* 216 P. 2d 825, 35 Cal. 2d 121. (1950). At least four other jurisdictions to save constitutionality judicially rewrote such statutes "to include general damages". *Werner* at 839 citing *Osborn* v. *Leach,* 135 N. C. 628, 47 S. E. 811, 815, and *Meyerle* v. *Pioneer Pub. Co.,* 45 N. D. 568, 178 N. W. 792, 795; *Holden,* supra, at 855-857 citing *Comer* v. *Age Herald Pub. Co.,* 151 Ala. 613, 40 So. 673; and *Ellis* v. *Brockton Pub. Co.,* 198 Mass. 538, 84 N. E. 1018.

Here the defamation was spread without "retraction" and by acknowledgement of Murchison's press agent "to the financial editors of the New York metropolitan dailies, the Daily News, Times, Herald Tribune, Daily Mirror, Post, Journal American, World-Telegram & Sun and the Wall Street Journal, to the wire services (UPI and AP) and to the PR news wire". (77a-78a) *A fortiori,* under the law of the above cases, if a "retraction" statute is constitutional because it affords a "substitute" for "general damages" and also allows "special damages" or is unconstitutional because it is not an adequate legal remedy, Section 337, N. Y. C. P. A. has been given an unconstitutional application by Judge Ryan since plaintiff here has not had the benefit either of a statutory suit for "retraction" or "general" or "special" damages.*

It was error for the Court of Appeals in these circumstances to affirm Judge Ryan's application of New York law.

V.

The lower courts' application of New York law violates the "due process" and "equal protection" guaranties of the Fourteenth Amendment to the Constitution.

As this Court stated in Rosenblatt v. Baer, 383 U. S. 75 (1966) "the scope of the privilege is to be determined by reference to the function it serves." (p. 84, note 10).

The scope of the statute is "a fair and true report of a judicial proceeding." He was required, if he made any report at all, to make it full, fair and impartial..." Lee v. Brooklyn Union Publishing Co., 209 N. Y. 245, 249-250." But while no authority controls us, the tendency of our courts is to restrict the rule of absolute privilege rather than extend it." Pecue v. West, 233 N. Y. 316, 321. "The privilege established * * * for reports of judicial proceedings embraces only 'full, fair and impartial' reports of such proceedings." Stevenson v. News Syndicate Co., 302 N. Y. 81, 88 (Emphasis supplied).

It is admitted that respondent made no report of petitioner's vindication in the same judicial proceedings which served as the basis for the defamatory publications. (74a). The

district court ruled that New York law did not require such publication. (74a-75a), and the Court of Appeals was silent on the issue. Petitioner submits that such a report was required under the "due process" and "equal protection of the law" guarantees. "Fair play ...is the essence of due process." Galvan v. Press, 347 U.S. 522, 530.

The "function" of the statute is to encourage a "full, fair and impartial" and a "true" report "of a judicial proceeding." That function is plainly impaired if the report, as here, is neither "full" nor "fair" nor "impartial. Under the Restatement rule, supra, and Dorr, supra, neither of these standards were met when respondent curtailed his "report" of the judicial proceedings and failed to report his victim's judicial vindication.

None of New York's courts have ever passed upon the question of whether a "full, fair and impartial" report can omit publication of the defamed person's vindication if the "privilege" is to be applied. Judge Ryan cited no case to support his ruling, but announced "There is no principle of law which so eradicates the privilege which has attached because of subsequent events." (74a-75a). The Court of Appeals was silent on the issue. The "principle of law" however which "eradicates the privilege", if after publishing the defamatory falsehood the party omits to publish the judicial vindication in the same proceeding reported upon, is the

principle of "Fair play" which "is the essence of due process." Galvan v. Press, 347 U.S. at 530, and which underlies Dorr and the Restatement rule. A statute that encourages only publication of the defamation and not of the vindication thereafter is obviously deficient in affording "the equal protection" of its law to both plaintiff and defendant in a litigation.

And certainly under the "due process" clause it is the duty of a federal court to protect its process so that it is not made the vehicle for "spreading any libel broadcast with impunity." (137 Mass. at 394).

As to substantive "due process" it must be clear that a rule of law which deprives a person of his reputation by Nationwide publicizing of defamatory falsehood, that provides no compulsory retraction statute, no compulsion upon the defamer to publicize his victim's vindication, and no damages or remedy of any kind is a rule of law that conflicts with "a basic of our Constitutional system." Rosenblatt v. Baer, 383 U.S. 75, 86, 92; in which this Court stated:

> "This conclusion does not ignore the important social values which underlie the law of defamation. Society has a strong and pervasive interest in preventing and redressing attacks upon reputation..." (p. 86)

Mr. Justice Stewart in concurring stated:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our Constitutional system." (383 U.S. at 92) *

And numerous State courts had earlier shown their accord with this doctrine. Thus the high court of Michigan stated in Park v. Detroit Free Press Co., 72 Mich. 560:

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* In Curtis Publishing Co. v. Butts, 388 U.S. 130, Mr. Justice Harlan speaking for himself and three other members of the Court was led

> "to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard..." (p. 155)

"There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization." (40 N. W. 731, 733)

In Meyerle v. Pioneer Publishing Co., 45 ND 568, the State's high court said:

"These damages (to a person's reputation) are in the nature of a property right; they have been said to constitute property. See 17 CJ 710, 829, 841. See Newell on Libel and Slander, p. 841; Pratt v. Pioneer Press Co., 35 Minn. 251, 28 NW 708; Cruikshank v. Bennett, 30 Misc. 232, 62 NYS 118; Adams v. Scott, 33 SD 194, 145 NW 446; 17 RCL 430, 431; Osborn v. Leach, 135 N. C. 628."

In Post Publishing Co. v. Butler, 137 F. 725, the court stated:

" * * * The right to general or compensatory damages is taken away. And yet such right is the very essence of the remedy by an action for libel, and such damages usually the only ones recoverable. In most cases it is almost

impossible to show any pecuniary loss by reason of the libel... Thus the statute virtually destroys the right to recover for an injury to one's standing and reputation alone. A statute somewhat similar to this before the Supreme Court of Minnesota in Allen v. Pioneer Press Co., 40 Minn. 117... was sustained seemingly because of the mandatory provision for a retraction. Similar enactments in Michigan, Kansas and North Carolina have been held unconstitutional. Park v. Free Press Co., 72 Mich. 560 ... Hanson v. Krehbiel, 63 Kan. 670... Osborn v. Leach, 135 N. C. 628.

* * * A man is entitled under the Constitution to a trial by jury, but he may waive it. So he is entitled to a remedy at law for an injury to his reputation ..." (p. 727) *

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* No member of this Court seems to have disagreed with Mr. Justice Stewart's statement in Rosenblatt, supra, that "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt " is entitled to recognition by this Court "as a basic of our Constitutional system." Petitioner may be wrong but he does not read the absolutist position of Justices Black and Douglas as expressing denial of this right.

"The best available current authority on New York law" on the construction of its "privilege" statute is that "any person" may publish "a fair and true report" by "disinterested outsiders" "of a judicial proceeding" but that if a plaintiff publishes his own pleading he must prove that "the publication was in good faith and without malice" and that if the publication was made "to accomplish an improper, collateral purpose" it is a "misuse of legal process" or "a cognizable tort for which the law will provide a remedy." Lewis v. The Chemical Foundation, 262 N. Y. 439 (1933); Oglesby v. Cranwell, 250 App. Div. 720 (2d Dept. 1937); 237 N. Y. 384 ( ); Hauser v. Bartow, 273 N. Y. 370, 373-374; ( ); Dean v. Kochendorfer, 237 N. Y. 384 ( ).

The court below misapplied New York law.

The latest New York decision, which was relied upon by the court below in other respects for reversing the dismissal of three counts of the complaint, shows that the court below in affirming dismissal of the libel counts on the above grounds misapplied the New York law. Thus Williams v. Williams, 27 App. Div. 2d 550 (2d Dept. 1966) which the court below termed "the best available current authority on New York law" distinguished the very cases cited by the court below as its authority as not properly applied in a case where a plaintiff published his own complaint and "there was never any 'fair and true report' of the defamatory action by disinterested outsiders..." (p.) *

"Defendants cite Lewis v. The Chemical Foundation (262 N. Y. 439) and Oglesby v. Cranwell (250 App. Div. 720) as authority for the contention that their publication of the defamatory complaint was privileged,

* In addition for this ground based on the construction of the statute, the Appellate Division ruled the complaint sufficiently pleaded a non-privileged claim because "the primary and sole publication of it (the complaint)" was "by defendant's maliciously mailing to numerous persons in the trade, of the complaint which defendant Williams had himself induced." "solely for the purpose of ruining plaintiff's business reputation". (p. 550)

In Lewis, the primary publication of the slanderous statements made in a judicial proceeding was a story in a newspaper. That publication was, of course, a privileged 'fair and true report' of a judicial proceeding; and the slanderer (the defendant in the Lewis action) merely republished the 'fair and true report' in the newspaper by mailing copies of the newspaper to many persons. Far different is the case at bar, where there was never any 'fair and true report' of the defamatory action by disinterested outsiders, but only the primary and sole publication of it, by defendants' malicious mailing to numerous persons in the trade, of the complaint which defendant Williams himself had induced. (Emphasis supplied)

Oglesby (supra) was a motion to strike out several defenses pleaded in the answer. ...defendant had brought a fraud action against the plaintiff and then had written a newspaper story describing the fraud action. Pleading the defense of privilege the defendant alleged that the newspaper story was a fair and true report of a judicial proceeding, published in good faith, without malice and with reasonable cause to believe the public was interested in the facts. We held that this defense was sufficient as a matter of pleading, primarily because of the allegation that the publication was in good faith and without malice." (Williams, supra, p.)

Thus neither of the only two cases cited by the court below for affirming without trial dismissal of the libel counts in the complaint upholds the practices pleaded in this case nor denies in any respect the sufficiency of the complaint. Here there is no publication at issue which was made by "a disinterested outsider" as in Lewis. Here the publications complained of are: (1) oral communications to newspapers by respondent's own attorney (Holland) who the record shows was paid $30,000 by respondent Murchison (R. 429) for obtaining two "phantom plaintiffs" to plead the charges of "fraud upon the Courts", "corrupt bargain" and "conspiracy" and whose complaint was struck from the files of the District Court for violation of Rule 11, F. R. C. P. which prohibits the filing of "sham and false" pleadings (Freeman v. Kirby et al., 27 F. R. D. 395); and (2) a "press release" of a public relations firm publicizing a pleading that the complaint herein alleges to have been unauthorized by the plaintiff in whose name its first count was filed and which made the charges of "fraud" etc. (23a, pars. 69 & 70). Insofar as these charges are stated in the "press release" to have also been alleged by John D. Murchison and Clint W. Murchison, Jr. (44a) as well as "dummy" plaintiff Gerard L. Fossland - all of whom realleged them in the second count - they still were not made by "a disinterested outsider". In addition, as Judge Dawson noted, the charges were filed "coincidentally with the institution of a proxy fight by Messrs. Murchison against Mr. Kirby" and the "great flurry of publicity (was) appar-

ently intended to affect the voting in the proxy contest for control of the corporation. The proxy fight was successful." Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et ano., 218 F. Supp. 164, 167.

The striking of one complaint as "sham and false" in violation of Rule 11, F. R. C. P., the use of a "dummy" plaintiff in another to allege the crucial first count - because the Murchisons not being shareholders at the time of the fraudulent acts complained of had no standing to sue thereon (Rule 23(b)(1), F. R. C. P.) - and the "great flurry of publicity" for proxy fight purposes would seem as a matter of law impossible to reconcile with the "good faith" required in Oglesby, not to mention the difficulty of reconciling such facts with proof of lack of "malice".

Furthermore, the use of the "press release" for proxy fight publicity without prior filing with the S. E. C. (21a, par. 61), as required by Rule X-14A-11(c)(1) of Regulation X-14 under the Securities Exchange Act of 1934, manifestly shows that the process of the federal court was "misused" because it sought "to accomplish an improper collateral purpose.", namely the use of the complaint to provide a base for unfiled proxy soliciting publicity.

Thus, leaving aside, all questions under the Fifth and Fourteenth Amendments, it seems clear that the court below decided these important questions in a way in conflict with the applicable state law.

VI.

The courts below failed to interpret New York law pursuant to Art. 1, §8 of the Constitution of the State which gives a right of action "for the abuse of the right" of freedom of speech and of the press.* There is no New York case that exculpates false, malicious and defamatory publication by a party of his own pleadings. And "This Court has never held that the press has an absolute privilege to publish falsity." (Time, Inc. v. Hill, 385 U. S. at 410, note 8 (Harlan, J.). "For 'the recognition of a privilege does not mean that it is without conditions or exceptions'" (Bridges v. California, 314 U. S. at 282.)

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* Art. 1 states: "Every citizen may speak freely and publish his sentiments on all subjects, being responsible for the abuse of the right." Thus there are no "absolute privileges" cognizable under the Constitution of New York.

We suggest that the effect of the decision below is for all practical purposes to choke-off a defamed defendant's access to the community of readers who read his defamation unless a defamer is required as a condition of his privilege to publicize to the same community of readers his victim's vindication. This follows from the fact that the defamer often alone knows the full extent of the circulation of the defamation, and in a city where there is only one newspaper and the newspaper prints only the defamation and not the vindication the victim has no "freedom of the press." Only the rule of law petitioned for herein guarantees him that freedom.

And that rule of law is not a new rule, but merely the rule of Dorr, supra, and the Restatement, Torts, § 611, supra.

VII.

The Court below erred in not construing the "absolute privilege" of New York Civil Rights Law § 74 defeasible by proof of "malice", since "malicious utterance of defamatory statements in any form cannot be condoned" and "malicious libel enjoys no constitutional protection

in any context." (Linn v. Plant Guard Workers, 383 U. S. 53, 63). (N.Y.Constit., Art. 1, Sec. 8)

Although this standard was cited to the court below it remained silent on the issue, as it did on all the other Constitutional issues.

This Court has made abundantly clear that both a "public official" and a "public figure" should not be deprived of a right of action for libel if the defamatory statement was made with "actual malice" or in "reckless disregard of the truth". New York Times Co. v. Sullivan, 376 U. S. 254; Curtis Publishing Co. v. Butts, 388 U. S. 130. In fact it would seem, in the words of Chief Justice Warren, that "slipshod and sketchy investigatory techniques" or in Mr. Justice Harlan's words that "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is enough to deny any privilege for publication of defamatory falsehood. (388 U. S. at 155, 169)

Here there is already an ajudication that two of the complaints that were the basis for defamatory and false publications were

"sham and false" and filed by "phantom plaintiffs", namely the Freeman federal and state court complaints (p. 4, supra). And the Fossland-Murchison complaint is alleged to have been unauthorized by the plaintiff Fossland in whose name its first count was filed and which charged petitioner with "fraud on the Courts", "corrupt bargain" and "conspiracy" (p. 11, supra). The complaint also alleges that "Freeman, Fossland and Manaster" were "induced and stimulated...to lend their names" as plaintiffs "in violation of the Canons of Professional Ethics of the American Bar Association" and that after trial on the merits Murchison's attorney Carter admitted there was no 'direct evidence' of the 'fraud' (218 F. Supp. at 176), despite his prior affidavit that "during his entire career as a lawyer he had never 'spent greater time assuring myself of the existence of direct proof of the essential allegations of the complaint as I did prior to its signing.'" (27 F. R. D. 14, 19). Yet on trial the court found that he had "completely and utterly" failed to establish any proof of the "fraud". (R. 261-297, pars. 77, 104 (b) and (c)). (218 F. Supp. at 187)

Clearly these allegations meet the test of "actual malice" or "reckless disregard of the truth." Yet in violation of the doctrine of Linn the court below, by affirming the dismissal "condoned" and gave "constitutional protection" to respondent's malice.

New York's highest court has expressed "doubt whether the omission of the express qualification of the privilege was intended to change the common law rule of liability where there is proof of 'actual malice'." (Murray v. Brancato, 290 N. Y. 52, 59.

In so stating the court said: "See discussion of the effect of similar omission in the analogous English statute. (Odgers, Libel & Slander, 267, 268) 290 N. Y. at 59. The statement in Odgers reads:

> "Fair and accurate reports of judicial proceedings whether published in a newspaper or not, were already privileged at common law; and we cannot believe that this section creates any absolute privilege- a privilege, that is, which is not destroyed by clear proof of express malice. There is no public interest which requires that such an absolute immunity should be extended to newspaper reports. Nor will such an immunity be inferred from the

mere absence of the words which are to be found in the next section: 'unless it shall be proved that such report was published maliciously.'" (Emphasis supplied) (Odgers, 1929 ed., p. 268)

New York's highest court nor any appellate division, so far as we have been able to find, has had an opportunity to pass upon this issue since the 1964-1967 libel decisions of this Court.

The decision of the district court herein was based on 2 cases (p. 18, supra). The Farrell case was decided 5 years before Murray v. Brancato. And the Kelly case cites 2 New York Court of Appeals' cases and an appellate division case (Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers, 260 N. Y. 106; Lewis v. The Chemical Foundation, 262 N. Y. 489; Oglesby v. Cranwell, 250 App. Div. 720), all of which show the rentention of the "actual malice" rule.

Clearly no high court in New York has squarely decided the issue. If it has, the 1964-1967 libel decisions of this Court in effect overrule on Constitutional grounds the right of defamation with "actual malice" of "reckless disregard of the truth."

VIII.

In denying petitioner a right of action under the Securities Exchange Act of 1934, the District Court, as affirmed without comment, by the Court of Appeals, decided the question in conflict with the decision of this Court in J. I. Case v. Borak, 377 U. S. 425 (1963).

The courts below played "ducks and drakes" with this claim of petitioner in counts 8, 13 & 14.

The ruling of Judge Dawson is quoted in full at p. 22, supra. Although professing difficulty in understanding what counts 8 & 13 were contending, the learned judge misquoted them as being under the Securities Act when in fact they are unmistakably alleged under "the Securities Exchange Act of 1934, 15 U. S. C. A. 78 et seq." (R. 261 at pars. 54 and 96). (19a, 29a)

Having placed them under the wrong statute, the judge then stated "Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other (libel) counts of the complaint." (55a). Thereafter Judge Ryan dismissed the libel counts without reinstating the Securities Exchange Act counts.

The Court of Appeals thereafter affirmed the dismissal of the counts without giving any reason therefor. Petitioner thereupon filed an application for correction of opinion and for extension of time to file petition for rehearing. Therein he stated:

> "In support of this application appellant respectfully refers this Court to the following statement in the Per Curiam opinion: 'We of the majority are in complete agreement with the position taken by our brother Moore in his dissenting opinion that the dismissal orders enterered below as to counts 3, 6, 7, 8, 9, 10, 11, 13, and 14 should be affirmed.' An examination of Judge Moore's dissenting opinion discloses however no "position taken by" Judge Moore with respect to the 9 counts in question except the statement he would affirm 'Judge Ryan's judgment in its entirety.'" "without mention or discussion of appellant's grounds for appeal."

Petitioner submits that the failure of the court below to grant the application for correction of its opinion constitutes a disservice both to this Court and petitioner. If the grounds for appeal of the Securities Exchange Act counts 8, 13 and 14 (Judge Dawson only referred to counts 8 & 13) are completely without merit it should be easy for so distinguished a court to articulate its reasons for ruling so in a few well-chosen sentences. Its failure so to do, both as to the libel counts and to the Securities Exchange Act counts unduly causes a petitioner to write a more extensive petition for certiorari, as here, in fear he may not have covered all possible unexpressed grounds for denial of his appeal. As it is, petitioner as well as this Court must remain in the dark as to which ground of Judge Dawson's for dismissal it found sound. As we show hereafter none is correct.

Count 14 alleges all the facts that Judge Dawson could not find merely by looking at counts 8 & 13.

Judge Dawson stated that petitioner "has alleged no facts sufficient to show any damage resulting to him personally by reason thereof" (the alleged violation of the S. E. C. pre-filing Rule X-14a-11(c)(1) and the alleged violation of Rule X-14a-9 prohibiting solicitations by means of "false and misleading statements"). Yet count 14 re-alleged all the statements of defamatory publication in the prior counts, all

the jurisdictional grounds, and further alleged they were part of "a continuing conspiracy... maliciously to defame plaintiff", "injured him in his reputation", "deprived him of earnings" and caused "plaintiff's appointment" as "consultant" to be "terminated." (32a-35a)

The district court's holding that petitioner should have sought injunctive relief and that his failure so to do deprives him of remedy in damages* is squarely in conflict with J. I. Case v. Borak, supra, which makes available "all necessary remedial relief". (377 U. S. at 435)

As this Court stated by quotation from Deckert v. Independence Shares Corp., 311 U. S. 282 (1940):

> "The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilitze any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." (377 U. S. at 433-434)

* See p. 22, supra.

The final ground of Judge Dawson for rejecting petitioner's claims determined an issue of fact without trial and improperly on a motion for summary judgment by defendant.

The court stated: "If there were any violation of the proxy rules, such violation cannot be said to be related in any way to the damages sought to be recovered by the plaintiff." (p. 22, supra)

The complaint alleges simultaneous violation of the pre-filing and false and misleading statement rule with the issuance of the defamatory statements. Thus it is an issue of fact whether his loss of employment followed from and would have been avoided had not the defamatory statements been issued. But the fact that the statements were proxy statements is undeniable in view of Judge Dawson's own finding in the related Alleghany case (218 F. Supp. 164) that they were "a great flurry of publicity apparently intended to affect the voting in the proxy contest for control of the corporation. (Id., p. 167, p. 18, supra).

Thus the statements were proxy statements, they explicitly identified petitioner as a target in the proxy contest and they have been adjudicated false and misleading. It is difficult to see what more relation petitioner should have alleged to establish his right to recovery under the Act, since this Court held in Borak that "It appears clear that private parties have a right under §27 to bring suit for violation of §14(a) of the Act... a right of action exists as to both derivative and direct causes." (377 U. S. at 430-431)

The only difference between the present case and Borak is that the latter related to damages upon the stock he held while the present case relates to damages to reputation for circulating in the words of the S. E. C. "(b) Material which...impugns personal reputation, or makes charges (of) illegal conduct ...without factual foundation." 17 C. F. R. §240.14a-9, note. (Emphasis supplied.)

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

Robert L. Bobrick
Attorney for Petitioner

Ernest P. Seelman
Of Counsel

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 257—September Term, 1966.

(Argued December 15, 1966 Decided August 23, 1967.)

Docket No. 30615

RANDOLPH PHILLIPS,

Plaintiff-Appellant,

—v.—

JOHN D. MURCHISON,

Defendant-Appellee.

Before:

WATERMAN, MOORE and FEINBERG,

Circuit Judges.

Appeal in diversity action from orders entered in the United States District Court for the Southern District of New York, Dawson, *J.*, and Ryan, *Ch.J.*, dismissing all fourteen counts of plaintiff-appellant's amended and supplemental complaint. The portions of the orders that are appealed are in part affirmed and in part, as to counts 1, 2, and 12, reversed for further proceedings below.

RANDOLPH PHILLIPS, New York City, *Plaintiff-Appellant, pro se.*

STUART N. UPDIKE, TOWNLEY, UPDIKE, CARTER & RODGERS, J. HOWARD CARTER, LEE W. MEYER, RONALD S. DANIELS, ANSON M. KELLER, New York City, *for Defendant-Appellee.*

PER CURIAM:

Appellant, who commenced this diversity action in the United States District Court for the Southern District of New York, alleging he had suffered defamation and other wrongs at the hands of the defendant, appeals from orders adverse to him entered below by Judge Dawson and by Chief Judge Ryan. His amended and supplemental complaint contains fourteen counts. Judge Dawson dismissed counts 1 through 5, and counts 8, 13, and 14, as failing to state claims or causes of action upon which relief could be granted.

Appellant has taken no appeal from the dismissal of two of these counts, counts 4 and 5.

Defendant-appellee Murchison some months later moved for summary judgment in his favor and, upon consideration of the motion, Chief Judge Ryan granted a final appealable judgment for appellee. He did not disturb Judge Dawson's disposition of the counts that Judge Dawson had dismissed and he dismissed the remaining six counts, counts 6, 7, 9, 10, 11, and 12. Thereafter appellant timely appealed these determinations (except from the dismissal of counts 4 and 5).

We of the majority are in complete agreement with the position taken by our brother Moore in his dissenting opinion that the dismissal orders entered below as to counts 3, 6, 7, 8, 9, 10, 11, 13, and 14 should be affirmed. Moreover, we of the majority do not cavil with the statement of facts underlying these proceedings and the factual references to

the history of the Alleghany litigation as he has set them forth, and therefore we do not find it necessary to discuss for ourselves that dramatic backdrop to the Phillips action.

We of the majority consider that we are required to hold that counts 1, 2, and 12 are properly pleaded, and that they set forth claims upon which relief could be granted.

Succinctly stated, it is our understanding that under the latest New York state judicial pronouncements made in *Williams* v. *Williams*, 27 App. Div. 2d 530, 275 N. Y. S. 2d 425 (2d Dep't 1966), and in *Chappelle* v. *Gross*, 26 App. Div. 2d 340, 274 N. Y. S. 2d 555 (1st Dep't 1966), decisions handed down subsequent to the orders appealed from here, those orders as to counts 1, 2, and 12 must now be reversed. Our brother Moore distinguishes these cases and relies upon New York trial bench decisions by New York State Justices Streit and Silverman in a collateral action brought by Phillips in the New York courts. Portions of these decisions are quoted in the dissenting opinion.

It would seem that these decisions by Justices Streit and Silverman handed down in the action Phillips brought in the New York courts are in line with the traditional New York law relative to allegations which must be set forth in complaints seeking damages for malicious prosecution and abuse of process, but the two recent Appellate Division decisions indicate a change in the rule.

In *Chappelle* v. *Gross, supra*, the court dividing 3-2 held that a complaint alleging that "the institution of the suit, with its accompanying *lis pendens*, was willful, malicious and without probable cause, with intent to injure the plaintiffs and to prevent them from conveying title to others with whom plaintiffs had a valid written contract of sale" was sufficient to survive a motion to dismiss. The *lis pendens* is a provisional remedy but a very mild one which

affords little interference with person or property compared to arrest, attachment, etc., and the case thus seems to be a weakening of the requirements of interference with person or property.

Soon after the *Chappelle* case was decided by the First Department, the Second Department handed down the decision upon which Phillips heavily relies, *Williams* v. *Williams, supra.* In that case, also by a divided court, 3-2, the court upheld a complaint alleging that an action was instituted "not with the intention of prosecuting it as a lawsuit, but solely for the purpose of ruining plaintiff's business reputation . . . " despite the absence of any allegation of interference with plaintiff's person or property. The case is also important here because it draws the distinction, a distinction not apparent on the face of the New York Civil Rights Law §574, between, on the one hand, a litigant's publication of a complaint to news media which media may if they wish abstract a true and fair report for further news publication, and, on the other, his direct publication of a complaint to private individuals.

Applying the principles of the *Williams* case to the various counts of Phillips's complaint, it is clear to us that counts 1 and 2 must be upheld. The allegations made by Phillips in counts 1 and 2 of his amended and supplemental complaint are not dissimilar to those alleged in *Williams* v. *Williams, supra.*

The court in *Williams* described the plaintiff's allegations as follows:

> Liberally construed, the first cause of action alleges that defendant Robert W. Williams caused a corporation to institute a false, defamatory action against plaintiff, not with the intention of prosecuting it as a lawsuit, but solely for the purpose of ruining plain-

> tiff's business reputation by widespread publication of the accusations made against plaintiff in that action; and that both defendants accomplished such improper purpose by deliberately and maliciously mailing copies of the defamatory complaint to many others in plaintiff's trade. 27 App. Div. 2d at ——, 275 N. Y. S. 2d at 426.

It held that these allegations sufficiently pleaded a cause of action for abuse of process or, if not abuse of process, at least "a cognizable tort for which the law will provide a remedy." 27 App. Div. 2d at ——, 275 N. Y. S. 2d at 426.

Counts 1 and 2 of Phillips's complaint allege, *inter alia,* that one Jesse Holland, acting as an agent of defendant John D. Murchison, filed a verified complaint in the name of plaintiffs who did not know anything about the subject matter of the action, and that the complaint charged Phillips with "perpetrating fraudulent and conspiratorial acts" with regard to the settlement of two derivative actions, involving Alleghany Corporation, that the complaint was sham (and indeed was subsequently stricken as such in a reported decision of the District Court for the Southern District of New York, *Freeman* v. *Kirby,* 27 F. R. D. 395 (SDNY 1961)), that it was filed "in furtherance of a conspiracy maliciously to use the process of this Court . . ." to injure Phillips, and that the contents of the complaint were published to various news media by Holland. Count 1 states that these acts constitute a malicious use of process, and count 2 states that they constitute an abuse of process.

As in *Williams,* these allegations sufficiently plead abuse of process or some other tort because they charge the "misuse of legal process to accomplish an improper, collateral purpose (citing cases)." 27 App. Div. 2d at ——, 275

N. Y. S. 2d at 426. Inasmuch as that case, the best available current authority on New York law, holds that an interference with a plaintiff's person or property is not a necessary allegation in an abuse of process or malicious prosecution complaint, counts 1 and 2 state a cause of action under New York law.

As we have stated, the court is unanimous that counts 6, 7, 9, 10, and 11 were properly dismissed. They all involve the publication of the contents of various complaints to various news media, and New York Civil Rights Law §574 is a good defense to such a situation. *Lewis* v. *The Chemical Foundation, Inc.*, 262 N. Y. 489 (1933); *Oglesby* v. *Cranwell*, 250 App. Div. 720, 293 N. Y. Supp. 67 (2d Dep't 1937). Count 12, on the other hand, involved publication of the complaint directly to named individuals, not news media, and we of the majority hold that it states a good cause of action.

The court in *Williams* held that the allegations set forth *supra* were not insufficient as a matter of pleading, before the defendants' answer, to support a claim for libel because the allegations indicated "there was never any 'fair and true report' of the defamatory action by disinterested outsiders, but only the primary and sole publication of it by defendants' malicious mailing, to numerous persons in the trade, of the complaint . . . ." 27 App. Div. 2d at ——, 275 N. Y. S. 2d at 427.

Count 12 of Phillips's complaint alleges, *inter alia*, that Murchison mailed copies of the complaint in an action by Murchison against Phillips and others to various named individuals in Minnesota, Ohio, Illinois, Delaware, and Canada and that the allegations in the complaint were "false, malicious, and defamatory."

We are of the opinion that under *Williams* this allegation sets forth a pleaded cause of action for libel. It is true that in other counts Phillips charges Murchison with causing similar information to be published in various newspapers so that the sole alleged publication of the material was not limited to individual persons, as in *Williams*. However, the *Williams* court could not have intended to allow a defendant, who has brought a lawsuit for "an improper, collateral purpose," to insulate himself from liability for his direct publication of a libel to individual persons by the fact that he also made the statement available to the press.

We recognize that the *Chappelle* and *Williams* decisions upon which we base reversal were by intermediate, not final, state appellate courts, both of which were divided 3-2. However, making our best "estimate" of "what the state court would rule to be its law," *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 209 (1956) (concurring opinion of Frankfurter, *J.*) we feel required to reverse the judgment as to counts 1, 2, and 12. We are informed that appeals from both the *Chappelle* and *Williams* decisions have been allowed to the New York Court of Appeals, but have no record information as to whether anything further has transpired in those cases in that court. The possibility of waiting for definitive rulings by the Court of Appeals has, of course, occurred to us. However, in view of the length of time that has elapsed since plaintiff filed his complaint, we do not feel justified in delaying our decision indefinitely. If our "estimate" of New York law, as evidenced by those two cases, should prove to be wrong, we are consoled by the knowledge that these remaining three counts will probably not reach trial before the New York Court of Appeals rules, if the appeals are pressed; the trial court, if it deems it advisable to do so, may delay trial for a rea-

sonable period (although allowing pre-trial proceedings to continue in normal fashion) to await guidance from New York's highest court.

We affirm the judgment below except for counts 1, 2, and 12. As to these counts, the judgment is reversed, and the cause is remanded for further proceedings below.

MOORE, *Circuit Judge* (dissenting as to counts 1, 2 and 12):

Randolph Phillips (Phillips), plaintiff-appellant, appeals from a judgment dismissing his amended and supplemental complaint (the complaint). The defendant-appellee, John D. Murchison, was the only defendant served, although his brother, Clint W. Murchison, was named as a defendant in the complaint. Counts 1-5, 8, 13 and 14 were dismissed on motion (Dawson, *D.J.*—opinion unreported); subsequently, on motion for summary judgment and on motion of Phillips to vacate the Dawson order of dismissal, Counts 6, 7, 9, 10, 11 and 12 were dismissed, the motion to vacate was denied and judgment of dismissal entered (Ryan, *D.J.*; 252 F. Supp. 513). The appeal does not include Counts 4 and 5.

The complaint, containing 14 counts, is based upon three legal theories (1) malicious use and abuse of legal process (malicious prosecution); (2) defamation; and (3) violation of certain sections and rules of the Securities Exchange Act of 1934.

The bibliographical material relevant to an understanding of the issues on this appeal is to be found in various opinions which comprise the Alleghany, Kirby, Murchison, Phillips saga (218 F. Supp. 164); *affirmed* 333 F. 2d 327; *affirmed en banc* 340 F. 2d 311; *certiorari granted* 381 U. S. 933; *dismissed* after argument as improvidently granted 384 U. S. 28).

For almost twenty years, a modern War of the Roses has been fought on judicial battlegrounds between the Kirby and Murchison forces. Each side has come to the fray well equipped with all the manpower essential to legal warfare, i.e., astute counsel, financial advisers, and imaginative public relations generals. Over the years, victories have been gained, defeats suffered, but the persistence of the litigants and the always available replacements from the Bar have enabled the war to continue. Anomalously enough, the bitterest battle arose over the treaty of peace. Although not an original combatant, Phillips, wearing neither a white nor a red rose, had kept more than in casual touch with the two camps. He had been a consultant to Brussel in the *Breswick*[1] litigation, to Graubard in the *Zenn*[2] suit, he had participated in the New York Central proxy fight, he had been a participant in discussions relating to a settlement of the stockholders' derivative suits and, in fact, had been regarded as controlling the minority stockholders' litigation. Whether Phillips was primarily responsible for the settlement of the stockholders' suits, he, at least, had an important role. Little wonder then that, when it suited Alleghany's interest to challenge the propriety and fairness of the settlement, charges should be leveled at the principal participants such as are evidenced by the allegation (Complaint par. 44, *Alleghany Corporation* v. *Kirby*, 218 F. Supp. 164, 176) that in return for Phillips' betrayal of his fiduciary duty to Alleghany, its stockholders and others and in return for his advocacy in obtaining for Kirby a settlement favorable to Kirby, Kirby undertook to secure for Phillips a

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1 *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, S. D. N. Y. 1955.

2 *Zenn* v. *Anzalone*, 17 Misc. 2d 897; 46 Misc. 2d 378, 259 N. Y. S. 2d 747.

directorship in Investors Diversified Services, Inc. (IDS), employment as a consultant by IDS and other emoluments.

On September 7 and 8, 1960, suits were commenced by stockholders on behalf of Alleghany against Allan P. Kirby, Fred M. Kirby, Phillips, Charles T. Ireland, Jr., and others, in substance, to nullify the Kirby settlement releasing him from any liability in the original stockholders' suit.[3] The two main issues in those suits, formulated after pre-trial conferences, were (1) whether there was a corrupt agreement between Kirby, Phillips and Ireland, whereby a settlement was made for an amount far less than otherwise under which settlement Phillips and Ireland personally benefited, and (2) whether Kirby failed to adduce on the court hearings facts material to a proper evaluation of Kirby's liability which were essential to a determination of the fairness and adequacy of the settlement.

The district court dismissed the complaint (Alleghany then under Murchison control had become the plaintiff) finding that Alleghany which had the burden of proof had failed completely to establish a breach by Phillips of a "fiduciary obligation to the minority stockholders in that he made a secret agreement for his own benefit which was not revealed to the Court" (p. 182). The district court then proceeded to find affirmatively that Phillips' directorship on the IDS Board did not warrant the conclusion that this nomination was pursuant to a pre-existing agreement. As to Kirby's alleged failure to produce facts essential to a proper determination of a fair settlement, the district court held that any such failure was not a basis for a collateral attack upon the judgment.

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3 *Freeman, et al.* v. *Kirby, et al.* (Sup. Ct. N. Y. Co.); *Freeman, et al.* v. *Kirby, et al.* (U. S. D. C. S. D. N. Y.); and *Murchison, et al.* v. *Kirby, et al.* (U. S. D. C. S. D. N. Y.). The *Freeman* suits were dismissed; the *Murchison* suit was tried.

This judgment came before this court for appellate review and was affirmed. 333 F. 2d 327 (1964). No appeal was taken from the district court's finding that there was no fraudulent agreement between Kirby and Phillips.

Piqued by the allegations (aspersions to him) in the September 8, 1960 derivative suit Murchison complaint, Phillips embarked upon a litigious campaign against his erstwhile colleagues, associates, employers and friends (?).

In September 1960, Murchison and others sought by proxy contest to secure for themselves the management of Alleghany then in Kirby's control. Phillips, a paid consultant to Kirby and Alleghany, on February 24, 1961, commenced a derivative action wherein he sought to enjoin a proxy contest. His attempt voluntarily to dismiss this suit being denied by the court, he then served (March 19, 1961), an amended complaint in which he added a charge of libel against Murchison. Over two years later, upon motion for summary judgment, all counts except Count 2 were dismissed. A second amended complaint was also dismissed. Then followed the present amended and supplemental complaint.

The Dawson Opinion

Judge Dawson dismissed Count 1 (malicious use of process), Count 2 (malicious abuse of process), Count 3 (malicious violation of Rule 11, F. R. C. P.), and Count 14 (malicious use and abuse and inequitable and alleged harassment) as failing to state claims upon which relief could be granted. No appeal was taken as to this dismissal.

Count 1 alleged that a suit entitled *Freeman and Manaster* v. *Kirby, Phillips et al.*, in the Federal court was brought "in furtherance of a conspiracy maliciously to use the process of this [Federal] Court and the New York State Su-

preme Court to the injury and damage of plaintiff." A similar suit was brought in the New York State Supreme Court. The suit was a derivative action on behalf of Allegheny and was characterized as seeking relief to obtain a vacatur of the settlement [of other previous lawsuits in the Federal and State courts] as to Kirby only." 27 F. R. D. 395, 396.

Count 2 made the same charges with the conclusory allegation that Murchison was part of a conspiracy "maliciously to abuse the process of this Court and the New York State Supreme Court."

Count 3 alleged a conspiracy maliciously to violate Rule 11 of the Federal Rules of Civil Procedure.

Judge Dawson concluded that it is the law of New York that to sustain a complaint in a civil litigation based on malicious prosecution, there must be an allegation that the plaintiff's person or property was interfered with in connection with the prior proceeding. Because there were no allegations of special circumstances which would take the case out of the general rule of interference with person or property, he dismissed Count 1.

The "abuse of process" count (#2) was found to be defective for the reasons applicable to count 1 and, in addition, because the bad faith alleged was in the institution of the action—not conduct after the action had been commenced.

The Ryan Opinion

Judge Dawson died in August 1964. On November 2, 1965, Murchison moved for summary judgment (Rule 56(b) Fed. R. Civ. P.), dismissing Counts 6, 7, 9, 10, 11 and 12 of the amended and supplemental complaint, and plaintiff moved to vacate so much of the Dawson order dated May 8, 1964, from which no appeal had been taken which had dismissed Counts 1, 2, 3, 8, 13 and 14. Judge Ryan denied

Phillips' motion to review Judge Dawson's dismissal of Counts 1, 2, 3, 8 and 13, and addressed himself to Counts 6, 7, 9, 10, 11 and 12. The court held that there was a judicial proceeding pending at the time of the publications, that New York law applied even to the out-of-state publications (Counts 11 and 12), and that the publications were a fair and true report of the judicial proceeding which they purported to report. Accordingly, the court held that Counts 6, 7, 9, 10, 11 and 12 should be dismissed because the alleged defamations were absolutely privileged under the statute (Sec. 74, *supra*).

While his Federal court action was in progress, Phillips also had pending a suit in the State court based upon similar charges. In *Phillips* v. *Alleghany Corporation,* New York Law Journal, December 29, 1965, p. 16, cols. 6-8), Phillips had made charges against Alleghany of malicious prosecution and abuse of process (Counts 1 and 2 here) based upon the institution of the *Murchison (Alleghany)* v. *Kirby, et al.*, suit in the Federal court. As to the malicious prosecution charge, the court (Mr. Justice Streit, New York Supreme Court) dismissed it, saying:

> "An action for malicious prosecution of a civil proceeding cannot be maintained where there has been no showing that the plaintiff's person or property was the subject of interference in the prior action by a provisional remedy such as arrest, attachment or injunction or otherwise.",

citing *Sachs* v. *Weinstein,* 208 App. Div. 360, wherein the court said (p. 365) that without such interference a

> "defendant, although successful is not entitled to maintain an action for malicious prosecution against the plaintiff, notwithstanding such action may have been

prosecuted without probable cause and maliciously, and resulted in damage to the defendant in excess of the costs recovered by him."

See also *Paul* v. *Fargo*, 84 App. Div. 9.

Dismissing the abuse of process cause of action, the State court said:

"An ulterior motive in the use of court process is not enough. There must be a further act done outside the use of the process, some perversion of the process (*Hauser* v. *Bartow*, 273 N. Y. 370, 374)."

Although the charges in the State Supreme Court case were based upon the Murchison suit, the Freeman suit was no different in theory and the same legal principles apply.

Phillips did not appeal from this decision. Instead he took advantage of leave to replead the fourth cause of action, also dismissed, which added to previous allegations the proxy fight motive.

This amended complaint, the gravamen of which was "that he was sued maliciously and without probable cause in a civil action," was also attacked as insufficient and suffered the same fate. In dismissing it, Mr. Justice Silverman (now Surrogate) held (New York Law Journal, June 8, 1966, p. 17, col. 6) that:

"As a cause of action for malicious prosecution, the complaint is insufficient for failure to allege an interference with plaintiff's person or property by a provisional remedy in the previous action";

that

"[T]here are reasons for the imposition of barriers to maintenance of malicious prosecution causes still recognized as valid in this jurisdiction.";

and that

> "Avoidance of these barriers may not be had by denominating the cause as one of prima facie tort * * *."

Despite no decision by the New York Court of Appeals changing, or even throwing any doubt as to the law as declared in previous decisions, the majority believe that two 3-2 decisions in the First and Second Departments of the Appellate Division of the New York Supreme Court, *Chappelle* and *Williams, supra,* now establish as the law that "an interference with a plaintiff's person or property is not a necessary allegation in an abuse of process or malicious prosecution complaint"—at least they say that this is their best estimate. Of course neither case stands for any such proposition. *Chappelle* involved a definite interference with property, namely, the filing of a *lis pendens; Williams* was based on the allegation that the suit was brought "not with the intention of prosecuting it as a lawsuit, but solely for the purpose of ruining plaintiff's business reputation by widespread publication of the accusations made against plaintiff."

The complaint under consideration in *Williams* was radically different from the complaint before us. On its face, the complaint here shows that the purpose of the action was, in a derivative action on behalf of Alleghany Corporation against Kirby, Phillips and Ireland, to attack the settlement of two other derivative actions brought on behalf of Alleghany (*Zenn* v. *Anzalone* and *Breswick & Co.* v. *Briggs*). In the light of this allegation, which must be accepted for the purposes of this decision, it is clear that the allegations which the court in *Williams* deemed essential are not present here. Nor could they very well be made since Phillips can scarcely allege that there was no

intention to prosecute and that the action was brought solely to ruin his reputation. The requirement of allegations which state a cause of action is not outmoded in these rapidly changing legal times because defendants are still entitled to have plaintiffs prove their charges.

In *Chappelle*, the court held that a complaint alleging that "the institution of the suit, with its accompanying *lis pendens*, was willful, malicious and without probable cause, with intent to injure the plaintiffs and to prevent them from conveying title to others with whom plaintiffs had a valid written contract of sale." was sufficient to survive a motion to dismiss (appeal pending in New York Court of Appeals). Furthermore, the comments in dissent of Mr. Justice Steuer in my opinion state a sounder policy, i.e., "If every successful defendant could turn around and sue the plaintiff and, by a liberal use of the word 'malicious' state a cause of action, a never ending source of new litigation would have a forum. Questions once thought to have been put to rest could be relitigated almost without limit. Judgment should mark the conclusion of the disputes between the parties and not be an invitation to further litigation" (p. 345).

The issues sought to be revived in this action have been litigated and re-litigated. There is no reason to believe that New York law departs from the policy of finality of judgment. Nor is there reasonable expectation that the New York Court of Appeals will reverse the principles well established during the years by the decisions expounding New York law relied upon by Judge Dawson and Justices Streit and Silverman.

The fallacy of the majority is the assumption that the allegations of counts 1 and 2 "are not dissimilar" to those in *Williams*. Even if *Williams* were to change the New

York law as to abuse of process actions and to set new requisites of a valid cause of action, plaintiff will indeed be hard put on any trial to prove (1) lack of intention to prosecute a lawsuit and (2) that the suit was brought "solely" to injure plaintiff. On its face, the complaint reveals that the suit was brought to upset a settlement in a stockholders' derivative suit. In this so-called liberal age of notice pleading, were the old requirement of *allegata et probata* to be sloughed off, plaintiff ought to assume the burden of the "allegata" so that at the end of his case defendant can point to the failure of the "probata."

In short, I would affirm Judge Ryan's judgment in its entirety. Phillips has had his "day" in court. A "day" even in Dickensian law should not be a lifetime.

Judgment of the Court of Appeals docketed on October 20, 1967

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of August one thousand nine hundred and sixty-seven.

Present:

HON. STERRY R. WATERMAN,

HON. LEONARD P. MOORE,

HON. WILFRED FEINBERG,

Circuit Judges.

RECEIVED
OCT 20 1967

Randolph Phillips,
Plaintiff-Appellant

v.

John D. Murchison and Clint W. Murchison Jr., individually and as persons doing business under the firm name and style of Murchison Brothers,

Defendants-Appellees.

DOCKETED AS
A JUDGMENT # 68,912
ON October 20, 1967
AT M.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, except for Counts 1, 2 and 12, and as to those counts, that said judgment be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court with costs to the appellant.

A. DANIEL FUSARO
Clerk

By: A. DANIEL FUSARO
Chief Deputy Clerk

A true copy.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORDER DENYING PETITION FOR REHEARING

FILED OCT.20,1967

Randolph Phillips,

Plaintiff-Appellant,

-v-

John D. Murchison,

Defendant-Appellee.

Petition for Rehearing

Randolph Phillips, New York City, Appellant, pro se

Petition denied.

October 19, 1967

S.R.W.

L.P.M.

W.P.

U.S.C.JJ.

Pages Omitted

Record references to pages 1a to 45a are to the complaint as printed in the Appellant's Appendix to the Court of Appeals, copies of which are being filed with the record herein.

APPENDIX B

—315-329—

Memorandum #29939 Filed May 8, 1964

DAWSON, *D.J.*:

This is a motion for dismissal of the complaint under Rule 41(b) for failure to comply with the rules and the orders of this court, or in the alternative, for a dismissal of certain counts under Rule 12(b) for failure to state a claim upon which relief can be granted. The complaint is being attacked for failure to be "simple, concise and direct" (Rule 8(e)), for setting forth events which have happened since the date of the original pleading, without a motion first being made under Rule 15(d), and for setting forth claims which may be barred by the statute of limitations.

The complaint presently under attack is the fourth complaint in this action. The original complaint was filed on February 24, 1961. The second complaint was filed as of right before the original complaint had been answered. This second complaint was dismissed on motion by order of the court on November 1, 1963, with leave to replead count 2. A third complaint was filed on November 7, 1963, and by order of the court on December 5, 1963 was dismissed with leave to replead again. The fourth complaint, now under attack, entitled "Amended and Supplemental Complaint" was filed on January 28, 1964. It contains fourteen counts and two exhibits for a total of thirty-seven pages.

Mr. Phillips has appeared *pro se* in this action. Although he has written a large amount of prose in his complaints, it is very difficult to determine exactly what his claims are. Previous hearings upon his complaint, resulting in the orders above referred to, have been designed to bring the litigation to a point at which the Court can determine exactly what issues are involved. The Court has been very

lenient with Mr. Phillips in trying to instruct him on the necessity of putting his claims in specific and definite form. However, he seems to think that as a *pro se* litigant he can burden the Court with numerous pleadings whose prolixity is exceeded only by their indefiniteness. It is necessary that some definiteness be reached in the pleadings so that the parties may understand them and so that the Court may determine what issues are to be tried when this case is reached for trial. Mr. Phillips may prefer to keep his complaint indefinite so as to use it as a handle for time-consuming and vexatious depositions. This is not the proper function of a pleading.

Mr. Phillips' procedure in this case is typical of the conduct referred to by Judge Kaufman of the Court of Appeals in the endorsement appearing on the order in *Ackert* v. *Bryan,* No. 27240, dated June 21, 1963. In this memorandum of Judge Kaufman, attached to the order, he said, referring to Mr. Phillips:

> " . . . He comes before this Court wearing the cloak of a *pro se* applicant, and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves in a long-closed litigation, moves which

serve only to distract us from important judicial business. . . ."

The present complaint now contains claims in three main categories, malicious prosecution, defamation, and violation of the proxy rules under the Securities Exchange Act of 1934. I shall discuss these categories and the counts thereunder seriatim.

Malicious Prosecution

In the general area of malicious prosecution, plaintiff Phillips has used four counts to seek recovery for the same act under slightly different legal theories. The act complained of is the instigation of civil actions in this court and in the New York State Supreme Court against Mr. Phillips and others. Count 1 seeks recovery on the theory of "a conspiracy maliciously to use the process of this Court and the New York State Supreme Court." Count 2 adds the slightly different theory of a "conspiracy maliciously to abuse the process." Count 3 more specifically charges a "conspiracy maliciously to violate Rule 11 of the Federal Rules of Civil Procedure." Count 14 in part alleges "a malicious use and abuse of process against plaintiff and an inequitable and illegal harassment of plaintiff through judicial proceedings."

Mr. Phillips is asserting claims of "malicious use of process," "abuse of process," "conspiracy to violate Rule 11," and "an inequitable and illegal harassment of plaintiff through judicial proceedings."

Each of these theories requires separate analysis. The law which must be applied is, of course, the law of the

Memorandum #29939 Filed May 8, 1964

State of New York since jurisdiction is based on diversity of citizenship and the acts constituting the tort, as well as the injury itself, took place within the state. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938).

The common law tort of malicious prosecution was originally restricted to relief from unjustifiable criminal litigation, but a majority of states have now extended that tort to ordinary civil actions. *Prosser, Law of Torts,* ¶99 (2d ed. 1955). When civil litigation is involved the term often applied is "malicious use of process." That is the term Mr. Phillips has used in count 2 of his fourth complaint.

Although New York still refuses the remedy for the ordinary civil suit, relief has been granted in certain exceptional cases. It is commonly stated in New York that to sustain a complaint based on malicious prosecution when civil litigation is involved, there must be an allegation that the plaintiff's person or property was interfered with in connection with the prior proceeding. See, *e.g., Black* v. *Judelsohn,* 251 App. Div. 559, 296 N. Y. S. 860 (1st Dep't 1937); *Schierloh* v. *Kelly,* 253 App. Div. 373, 2 N. Y. S. 2d 188 (2nd Dep't 1938); *Woodard* v. *Southampton Federal Savings & Loan Association,* 161 N. Y. S. 2d 522 (Sup. Ct. 1957).

For additional cases see, *Annot.,* 150 ALR 897, 902 (1944).

However recovery has been allowed in at least one case for an ordinary civil suit repeatedly initiated without ground although there was no interference with person or property. *Pangburn* v. *Bull,* 1 Wend., N. Y. 345 (1828).

Memorandum #29939 Filed May 8, 1964

Perhaps a more accurate statement of the rule in New York is as follows:

> "Damages are rarely recovered, however, for the malicious prosecution of a civil action, unless person or property is interfered with by some incidental remedy, such as arrest, attachment or injunction." *Burt* v. *Smith,* 181 N. Y. 1, 2, 73 N. E. 495 (1905).

(The same statement can be found in *Hubbard* v. *Banker,* 24 N. Y. S. 2d 289, 294 (County Court 1940), *aff'd* 260 App. Div. 901, 23 N. Y. S. 2d 198 (4th Dep't 1940)).

Plaintiff has failed to state any special circumstances which would take this case out of the general rule. Since no interference with person or property has been alleged, the claims of malicious prosecution must be dismissed.

Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. *Assets Collecting Co.* v. *Myers,* 167 App. Div. 133, 152 N. Y. S. 930 (1st Dep't 1915).

In New York State abuse of process is generally said to require the same allegation of interference of person or property as does malicious prosecution. *Silverman* v. *UFA Eastern Division Distribution Inc.,* 135 Misc. 814, 236 N. Y. S. 18 (Sup. Ct. 1929); *Tricomi* v. *Tricomi,* 192 Misc. 763, 81 N. Y. S. 2d 750 (Sup. Ct. 1948); *Roberts* v. *B. Gertz Inc.,* 24 Misc. 2d 58, 203 N. Y. S. 2d 62 (Sup. Ct. 1960).

Memorandum #29939 Filed May 8, 1964

A possible exception to the general rule is found in the case of *Cardy* v. *Maxwell,* 9 Misc. 2d 329, 169 N. Y. S. 2d 547 (Sup. Ct. 1957), where a cause of action was found when the complaint alleged that the defendants threatened the plaintiff with adverse newspaper publicity unless he paid several million dollars to them to withhold further action by them. The *Cardy* case rests upon its own special facts, however. It appears to be an aggravated case to which the general rule does not apply. It is in that sense parallel to the *Pangburn* case, *supra.*

In the abuse of process count, just as in the count for malicious use of process, plaintiff has failed to state any special circumstances which would take this case out of the general rule.

Furthermore, abuse of process does not lie since the alleged bad faith on the part of the defendants was the institution of the action, not the abuse of the process of the court after it had been issued. See, *Assets Collecting Co.* v. *Myers,* 167 App. Div. 133, 152 N. Y. S. 930 (1st Dep't 1915); *Miller* v. *Stern,* 262 App. Div. 5, 27 N. Y. S. 2d 374 (1st Dep't 1941); *Lyons* v. *Scriber,* 174 N. Y. S. 332 (Sup. Ct. 1918); *Rubinstein* v. *Rubinstein,* 35 N. Y. S. 2d 926 (Sup. Ct. 1942).

Certain remarks in the *Lyons* case fit the case at bar exactly:

> "The only allegations in the complaint, which by any possibility related to acts subsequent to the issuance of the summons herein, are the statements of the publication of the particulars of the complaint and the verbal statements alleged to have been made by the

defendants after such publication. This was not abuse of process." (At p. 334).

The theories of "conspiracy to violate rule 11," and "an inequitable and illegal harassment of plaintiff through judicial proceedings," insofar as they are distinct from malicious use of process and abuse of process, are not recognized torts.

Counts 1, 2, 3 and 14, the malicious prosecution counts, must therefore be dismissed for failure to state a claim upon which relief can be granted.

Defamation

The 4th and 5th counts of the Amended and Supplemental Complaint purport to state causes of action for libel. The complaint shows that the alleged libelous statements were contained in a draft of a complaint delivered by attorney Adams (attorney for defendant John D. Murchison) to an attorney by the name of Holland (alleged to be an agent of Murchison). The 4th count relates to a complaint denominated the "Klafter complaint"; the 5th cause of action relates to a complaint denominated as the "Murchison complaint."

We have, therefore, a situation where on the face of the pleading one attorney delivered to another attorney a draft of a complaint. Each of these complaints was purportedly a derivative action on behalf of Alleghany Corporation against Phillips and against various other defendants. It was a draft of the complaint in an action on behalf of a corporation in which defendant Murchison was admittedly

a large stockholder and in which he had an important interest. It appears from Paragraph 9 of the complaint that attorney Holland thereafter composed a complaint, filed it in this court in such an action, and that in connection with the complaint filed by him he used the draft complaint hitherto referred to. It is alleged in Paragraph 13 that Holland acted as an agent of the defendant Murchison in this matter.

We have, therefore, in summary, this situation: that one attorney for defendant Murchison drafted a complaint and gave it to another attorney alleged to be an agent of defendant Murchison for his consideration in the institution of an action. These were steps which were preliminary steps in the course of taking a legal action. Whether the allegations in the draft complaint could be supported would, of course, be a matter for the subsequent judicial proceedings. It would be a strange situation if every time a defendant won a lawsuit he could sue his opponent for libel because his attorney consulted another attorney on the drafting of the complaint. It certainly could not be allowed that an attorney who consults his associate about the drafting of a complaint and shows him a draft of a complaint can be charged with libel if it subsequently turned out that the allegations could not be sustained at the trial. To apply any such rule would be utterly disruptive of legal proceedings and the proper representation of clients by their attorneys.

It is for this reason that there is an absolute privilege for statements made in the course of judicial proceedings if the statements are material or pertinent to the issues involved. *Youmans* v. *Smith*, 153 N. Y. 214, 47 N. E. 265 (1897); *People ex rel. Bensky* v. *Warden of City Prison*,

Memorandum #29939 Filed May 8, 1964

258 N. Y. 55, 179 N. E. 257 (1932); *Andrews* v. *Gardiner*, 224 N. Y. 440, 121 N. E. 341, 2 ALR 1371 (1918). This rule has been liberally construed so as to afford its protection not only to formal pleadings and affidavits, but also to communications between parties to the action and their attorneys. See, *Zirn* v. *Collum*, 187 Misc. 241, 63 N. Y. S. 2d 439 (Sup. Ct. 1946); *Di Tullio* v. *Deacy*, 16 Misc. 2d 565, 183 N. Y. S. 2d 585 (Sup. Ct. 1958).

The rule has also been applied to the printing and distribution of copies of proposed questions to be used in disbarment proceedings. *Youmans* v. *Smith, supra.*

The publication of a draft complaint is covered by the privilege. The drawing of drafts and their distribution among attorneys and clients are necessary steps in taking legal action.

The allegedly libelous material was clearly pertinent to the judicial proceedings which the attorneys Adams and Holland were thinking of instituting.

On the face of the complaint the alleged libelous matters were absolutely privileged under the circumstances set forth in the complaint. A trial on any such issue would inevitably result in dismissal of the complaint. There is no reason to burden this Court and the parties with long litigation where the outcome is so obvious. The 4th and 5th counts are dismissed for failure to state causes of action.

Counts 6, 7, 9, 10, 11 and 12 are based upon allegations of defamation. Counts 6 and 7 allege defamation by telephone calls to various newspapers. Counts 9, 10 and 11 allege defamation by the issuance of a press release to newspapers. Count 12 alleges defamation by distribution to vari-

ous persons of a copy of a complaint filed in this court, which plaintiff says was defamatory.

Under the circumstances of this case it may be dubious whether plaintiff will be able to establish the defamation which he alleges in the counts of the complaint. But this issue cannot be decided merely upon the face of the complaint. It must await further proceedings in the litigation. These counts of the complaint are inartistically drawn but they are sufficient to advise the defendants of the nature of the claims made and to define the issues with sufficient clarity to enable them to be tried.

So much of the motion as seeks to dismiss counts 6, 7, 9, 10, 11 and 12 of the complaint is denied.

Paragraphs 75 and 76 of the complaint are stricken pursuant to Rule 12(f) as immaterial, impertinent and scandalous. The allegations contained therein certainly have no part in this litigation.

Alleged Violations of the Securities Act

Counts 8 and 13 appear to claim damages for violations of the Securities Act, although it is difficult to ascertain from a reading of the complaint exactly what the contentions of the plaintiff are with reference to these counts. Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other counts of the complaint. Insofar as the counts may allege violations of the Securities Act, or the rules and regulations thereunder, plaintiff has alleged no facts sufficient to show any damage resulting to him personally by reason thereof. The meetings of stockholders concerning which proxies were solicited have been held. He did not seek to enjoin the use of the

Memorandum #29939 Filed May 8, 1964

proxies or to enjoin the holding of the meetings or the action taken thereat. For him to wait and now seek personal damages for alleged violations of the Securities Act is not justified. If there were any violation of the proxy rules, such violation cannot be said to be related in any way to the damages sought to be recovered by the plaintiff. *Cf., Mills* v. *Sarjem Corporation,* 133 F. Supp. 753, at p. 768 (D. C. N. J. 1955).

The motion to dismiss counts 8 and 13 of the complaint for failure to state a cause of action is granted.

So ordered.

Dated: New York, N. Y.
May 8, 1964

/s/ ARCHIE O. DAWSON
U. S. D. J.

—508-535—

Opinion Filed March 28, 1966

Randolph Phillips, plaintiff, pro se.

Townley, Updike, Carter & Rodgers, New York City, for defendant, John D. Murchison, J. Howard Carter, Lee W. Meyer, Ronald S. Daniels, Anson M. Keller, New York City, of counsel.

RYAN, *Chief Judge.*

Defendant John Murchison has moved under Rule 56(b) F. R. Civ. P. for summary judgment dismissing the amended and supplemental complaint with prejudice upon the ground that the matter complained of in the pending counts of the said complaint are absolutely privileged as a matter of law under Section 337 of C. P. A. (now Sec. 74 of the Civil Rights Law). This privilege has been pleaded as an affirmative defense to all counts.[1]

Plaintiff has moved for an order "vacating that part of this Court's memorandum and order of May 8, 1964 [by Judge Dawson] dismissing Counts 1, 2, 3, 8, 13 and 14 of the amended and supplemental complaint".

Although the suit is filed against Murchison brothers, individually and as a partnership, the only defendant who has been served and has appeared is John D. Murchison.

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[1] Section 337 of the New York Civil Practice Act (now Section 74 of the Civil Rights Law) provides in relevant part:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

Opinion Filed March 28, 1966

The complaint rests on allegedly libelous newspaper reports but the alleged offending newspapers have not been sued. This is the fourth complaint since 1961 which plaintiff has filed in support of the charge that he was defamed —the three prior complaints were dismissed by Judge Dawson as were six counts of the fourth leaving for our disposition the 6th, 7th, 9th, 10th, 11th and 12th counts.

At the outset, we deny plaintiff's motion because this Court has no authority or power to review Judge Dawson's dismissal of these counts on May 8, 1964. That after his decision the Judge signed an order to show cause to reconsider Counts 8 and 13, which was never heard because of his death prior to its return date is no authority for reconsideration of his decision by me. I cannot say that Judge Dawson would have vacated his decision and reinstated these counts; the signing of the order to show cause was an indifferent judicial act of no determinative significance. It decided nothing—not even whether the Court would reconsider. In fact, examination of the reasons urged by plaintiff for reconsideration discloses nothing which in our opinion might have caused Judge Dawson to change his decision. J. I. Case Co. v. Borak, 377 U. S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 the authority relied on by plaintiff in support of his order to show cause does not validate these counts. Besides since Judge Dawson's death plaintiff has done nothing to bring the order to show cause on for hearing until defendant made the instant motion to dismiss the remaining counts. Now eighteen months later, plaintiff seeks reconsideration not only of Counts 8 and 13 but of the remaining ones, as to which he had never sought re-

consideration. Obviously, plaintiff thought as little of his chances of succeeding as we do. This motion is denied,—both procedurally and on the merits.

We turn now to defendant's motion and to the two questions which are determinative of its outcome,—whether the matter complained of was published in connection with a judicial proceeding and if so whether it fairly and accurately reported the proceeding. The first question can be resolved on the documents filed in connection with this motion; the second requires a comparison of the content of the judicial proceeding with the matter reported.

It is urged by defendant that the determination of both questions may be made by the Court as a matter of law because the question of whether the privilege attached is a question of law. Plaintiff urges that neither may be determined by the Court since underlying both are disputed issues of fact which require a trial.

The defamatory statements charged in this suit arise out of the reporting of commencement of two derivative stockholders suits on behalf of Alleghany Corporation against Phillips and others: one, the *Freeman* suit in the New York State Court and the other, the *Murchison* suit in this Court.

Specifically, the complaint alleges in the remaining counts before us, as follows:

Count 6 charges that plaintiff was slandered on September 7, 1960, when defendant's "agent" Holland (his attorney) telephoned the Wall Street Journal to report to it the institution of the *Freeman* suit, and that plaintiff was libeled by that paper's republication of the report on Sep-

tember 8, 1960. In this count plaintiff sets forth that part of the report which he charges was defamatory.

Count 7 charges that plaintiff was similarly slandered when Holland telephoned this information to the Herald Tribune on the same day, and that plaintiff was libeled when that paper republished this report on September 8, 1960. Again, plaintiff sets out that part of the report which he claims defamed him.

Count 9 charges that plaintiff was libeled by defendant when Hill & Knowlton, a firm of press agents acting on defendant's behalf, issued from their New York office a press release to newspapers and wire services in the State of New York and elsewhere in the United States, and to individuals in the State of New York and elsewhere in the United States, through the use of the mails and otherwise, which was headed "For: Murchison Brothers *For IMMEDIATE RELEASE: THURSDAY, SEPTEMBER 8, 1960*"; that by issuing said press release through Hill & Knowlton, Inc., defendant Murchison caused the substance of it to be published by newspapers, magazines, and wire services throughout the United States, thereby causing widespread and extensive circulation of the aforesaid false, malicious, and defamatory statements. This count goes on to recite the dismissal on the merits of the charges against plaintiff which had been so publicized in the press release, and the failure of defendants to cause a press release to be issued publicizing this decision of this Court, or communicating the decision of this Court to those newspapers which had reprinted defendants' press release.

The Tenth Count charges that plaintiff was defamed as a result of the republication of the press release of September 8, 1960 in the New York Times and in the New York World Telegram and Sun on September 9, 1960.

The Eleventh Count charges a similar defamation as a result of the republication of the press release in the Minneapolis Morning Tribune of September 9, 1960, which statements are alleged to have been telephoned to the newspaper by defendant or his agents in New York City to that paper's Business Editor in Minneapolis.

The Twelfth Count charges that the mailing on September 13, 1960, by defendant of copies of the Murchison complaint to his fellow directors throughout the United States and Canada constituted a libel and alleges as well that some of the allegations of the complaint itself were libelous.

No question is presented as to the defamatory nature of the statements pleaded in the complaint.[2]

In support of his position that there were judicial proceedings pending at the time of all publications complained of and that there is no question as to when these judicial proceedings began, defendant has submitted various affidavits based on personal knowledge. With respect to the *Freeman* suit against Phillips, Kirby and Ireland in the State Court there is an affidavit of Holland, attorney for the stockholder Freeman, which unequivocally states that

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[2] "In short, and bluntly put, it is charged that for a price, Phillips sold out to Kirby and betrayed the interests of those he purported to represent, in advocating the acceptance of a separate settlement with Kirby for $1,100,000 when he knew the latter's liability in the lawsuits had been evaluated at $35,000,000, and that the sum of $1,100,000 was considerably less than Kirby would have had to pay in settlement except for the alleged corrupt conduct; that the conspiracy encompassed the lifting of the injunction of this Court, as well as the entry of an order of dismissal as to Kirby, which were achieved by the concealment of his alleged duplicitous conduct from both Courts." Murchison v. Kirby, D. C., 27 F. R. D. 14, 17 (1961).

he, Holland, personally served the *Freeman* summons and complaint upon Ireland and Alleghany on September 7, 1960, and that subsequent to this service he, Holland, telephoned the Wall Street Journal and New York Herald Tribune to inform them of the institution of this suit. The summons and complaint are attached as an exhibit and are dated and verified respectively September 7, 1960. There is no question that the date of the newspaper publications was September 8, 1960. Although no affidavit of service of the summons and complaint on Ireland and Alleghany has been submitted on this motion, the sworn statement of Holland, a member of the bar of this Court, and counsel for Freeman at the time, is supported by the report in the Wall Street Journal on September 8, 1960, that "Mr. Ireland confirmed he had been served with the suit, which is being brought in New York State Supreme Court." For this statement to have appeared in the paper, which was on public sale on the morning of September 8, 1960, it would have had to be printed at the latest the night of September 7, 1960, the day on which Holland says he served Ireland. The affidavit of Mr. Carter, attorney for defendant on this motion, adopts and reaffirms the statements in Holland's affidavit.

With respect to the Murchison suit filed in this Court against Kirby, Phillips and others, there is the affidavit of Huschle, an attorney in the office of the attorneys for Murchison in that suit (and present counsel) to the effect that he filed the complaint in this Court on September 8, 1960 sometime before 4:30 P.M. and that he reported the completion of such filing to a member of the firm. The records

of this Court established that this complaint was filed on that day. There is a further affidavit of Cheney, Vice-President of Hill & Knowlton, press agents for Murchison, stating that on September 8, 1960 he read the Murchison complaint and discussed its allegations with counsel for Murchison and prepared a press release to announce the commencement of the action, but that he was instructed not to and did not distribute the release until he had received word from counsel of the filing of the complaint. Mr. Carter's affidavit adopts and reaffirms these statements.

Opposed to these we have two affidavits of plaintiff and a Rule 9(g) statement reciting numerous facts as to which he says there is a genuine issue. We will consider only those that are relevant to this motion:

1. Whether or not the publications complained of in the 6th, 7th, 9th, 10th and 11th Counts were a "fair and true report of the judicial proceeding they purported to report."

2. Whether the statements in the affidavit of Holland as to the times of service of his complaint in the Freeman action and of his telephoned communications to the Wall Street Journal and the Herald Tribune are true.

3. Whether the statement in the affidavit of Cheney as to the time of his receipt of the Murchison complaint, his discussions with Murchison's attorneys, the preparation of the press release and its delivery to others is true.

4. Whether the statement in the affidavit of Huschle as to the time of the filing of the Murchison complaint and his notification to his office is true.

5. Whether the statements in the affidavit of Mr. Carter —referring to the above three affidavits are true.

Plaintiff's affidavits to support these issues insofar as relevant are to the effect that he denies the allegations in all the affidavits "as to the times of service of the complaints referred to, of the times of publication of the complaints referred to, and of the times of the discussions or reports therein referred to"; and that he "challenges their credibility with respect to their material allegations."

Further averments as to the time of the "filing" of the *Freeman* action in the State Court, and of the service upon him in *both* actions and of his opportunity to answer the complaints are totally immaterial to the question before us and do not challenge the facts relied on by defendant to support his motion.

It cannot be disputed (and plaintiff conceded this) that an action of the nature here involved is commenced in the New York State court by the service of the summons upon any one defendant, and in the Federal court "[a] civil action is commenced by filing a complaint with the court." (Rule 3 F. R. Civ. P.). The filing of the complaint in the *Freeman* suit in the State Court, and the service of a defendant with process in the Murchison suit in the Federal court is not required in the establishment of the pendency of a judicial proceeding. Once the pendency of the judicial proceedings has been established the privilege attaches irrespective of whether the proceedings were public knowledge or known to plaintiff. (Campbell v. New York Evening Post, 245 N. Y. 320, 157 N. E. 153, 52 A. L. R. 1432).

Opinion Filed March 28, 1966

Plaintiff's denial is a group denial of the material allegations of the time of service and the telephone calls, lumped together so vaguely as to make it impossible to determine exactly what plaintiff is contesting. He denies "times of service of the complaints", which could include service of the Murchison complaint and which is not relevant; he denies "times of publication" which could include the telephone calls, as well as the press release, the discussions with counsel and the newspaper reports—some of which are incontestable. Although plaintiff has had more than five years in which to inform himself of the true facts relating to the time of service, the telephone calls, the discussions, etc. he has stated no facts to contradict counsel's sworn statements and the supporting exhibits.

Plaintiff seeks to create an issue of fact out of nothing more than his bald statement that there is an issue of fact as to the truthfulness or falsity of counsel's statements. All he discloses by this challenge to the credibility of counsel's statements is a baseless hope that by cross examination he will be able to establish that both former and present counsel for Murchison are not truthful. He has shown no facts which would form the basis for reaching the conclusion that counsel did not serve the summons and complaint in the *Freeman* suit when he swears he did. Certainly, this Court is not to conclude, without substantial basis for doing so that two members of its bar of experience and good reputation have perjured themselves and deceived the Court in order to gain some procedural advantage over their adversary. No genuine issue of the credibility of these witnesses requiring a trial has been raised;

summary judgment will lie in such case (Topp-Cola Co. v. Coca-Cola Co., D. C., 185 F. Supp. 700; Orvis v. Brickman, D. C., 95 F. Supp. 605, aff'd. 90 U. S. App. D. C. 266, 196 F. 2d 762; Scolnick v. Lefkowitz, 329 F. 2d 716, 2d Cir. 1964). To hold otherwise would mean that any time issue has been joined in an action, summary judgment will not lie. Rule 56(e) requires not a reassertion by the adverse party of his allegations or denials but a response by affidavits setting forth specific facts showing the issue which must be tried.

We find that there was a judicial proceeding pending at the time of the publications in the Wall Street Journal and the Herald Tribune, the libel alleged in Counts 6 and 7, and at the time that Holland telephoned these papers—the slander charged in Counts 6 and 7. It follows that we find that the republication of the press release in the World Telegram, the New York Times and the Minneapolis Morning Tribune of September 9, 1960 reporting the institution of the Murchison suit in this Court was made while there was a judicial proceeding pending, in view of the fact that complaint had been filed in this Court on September 8, 1960.

This brings us to Count 9, which as we have seen charges libel through the issuance and publication of the press release by defendant's press agent reporting the institution of the Murchison suit to the newspapers and their publication of it on September 9, 1960. The issuance of the press release to the newspapers is sworn by Cheney, the press agent, to have been made on September 8, 1960 after he had been advised by counsel for Murchison that the complaint had been filed. Again, plaintiff has submitted no

facts showing that there is a question as to when Cheney released the press release to the papers, and in fact under his very vague denial he has not ever concretely denied that the press release was in fact released following the institution of suit. Using the Cheney affidavit as a springboard, plaintiff in a belated attempt to immunize this Count 9 from the protection of a judicial proceeding, attempts to argue that he was libeled when counsel for Murchison prior to the filing of the complaint showed Cheney the complaint in order that he might prepare a press release. There is no question that Cheney did see the complaint prior to its filing—he has so sworn—as there is no question that plaintiff has nowhere charged that this disclosure by defendant to his press agent constituted the publication complained of by him. It is unnecessary for this Court to determine whether publication by a party to a press agent under contract to the party for the purpose of having him prepare a press release of a contemplated judicial proceeding is protected or actionable. Plaintiff has repeatedly described his count as charging "publication of defamatory matter by press release throughout the United States" and cites Munafo v. Helfand, D. C., 140 F. Supp. 234, 237 for the proposition that "delivery of the press release to the newspapermen was publication in and of itself," making it quite clear that this is the publication complained of and not the prior one by counsel to Cheney.

We find that publication of the press release by Cheney to the newspapers was made when there was a judicial proceeding pending and that it was therefore privileged.

After four complaints and six years there would be no reason to permit the filing of an amended count charging

libel by publication to defendant's agent in view of the fact that such a claim is barred by the one-year statute of limitations, (CPLR 215 (C. P. A. §51(3)) that it may not relate back to the libel now pleaded (Hartmann v. Time, Inc., 3 Cir., 166 F. 2d 127, 1 A. L. R. 2d 370) and that the damage, if any, suffered by plaintiff arose not from the publication by defendant to its press agent, but rather from the publication by the defendant's agent to the newspapers.

The second question to be determined with reference to all the remaining counts is whether the publications—the telephone call, the press release and the newspaper reports—fairly and truly reported the judicial proceedings we have found pending. The resolution of this is essential not because plaintiff has charged that they were not fair and true reports, for he has not done so, but because this is the other statutory requirement, which must be met before the privilege attaches. The ultimate question of application of the statute to the publication is of course one of law for the Court, but the primary one of fairness and truth may or may not present a question of fact which might require a hearing before the statute may be applied.

Whether such a factual issue exists can be determined only from an examination of the evidence before the Court—that is, the complaints which form the basis of the judicial proceedings and the language employed to report them. Obviously if the reports were verbatim reprints of the complaints, the matter would end there, but they are not and it is necessary therefore to compare the reports with the complaints in order to determine whether there

is an issue as to their fairness and truthfulness. The complaints, the press release and the newspaper reports are before the Court—they are undisputed. No claim is made that the telephone calls made by Holland, which form the basis for plaintiff's claim of slander in Count 6, published matter other than that which appeared in the newspaper reports, which are undisputed, so that as to this charge of slander no issue is presented. That the Court may make the determination is established. Gregory v. Daily Gazette Co., 22 A. D. 2d 846, 254 N. Y. S. 2d 66.

> "Where as here and as conceded by the parties, all of the essential facts appear in the pleadings and the only question is a question of law as to whether the publication is a fair report of court documents atttached to the complaint, judgment on the pleadings is proper." Schachter v. News Syndicate Co. Inc., 270 App. Div. 378, 380, 59 N. Y. S. 2d 693, 694 (1st Dept. 1946.)

In George v. Time Inc., 259 App. Div. 324, 19 N. Y. S. 2d 385, 386, App. Div. 1st Dept. 1940, it was held that "• • • on the undisputed facts in this record as to the content of the Circuit Court's opinion (the judicial proceeding), and the language used by defendant in reporting it, the issue as to whether the article was a fair and true report was an issue of law for the court."

This is in accord with Seelman, Libel and Slander in the State of New York (rev. ed. 1964) at p. 278 where the law of New York is tersely stated that:

> "Where the question of fair report arises solely from the publication of the contents of legal documents; or

upon undisputed testimony of the court occurrence, it is for the court to decide."

The question of malice, a true question of fact, does not defeat the privilege; its resolution therefore even if pleaded is not necessary to an application of the privilege (Kelley v. Hearst Corp., 2 A. D. 2d 480, 157 N. Y. S. 2d 498; Farrell v. New York Evening Post, 167 Misc. 412, 3 N. Y. S. 2d 1018 (Sup. Ct. N. Y. Co. 1938)).

The entire reports must be read, but the following excerpts illustrate their overall nature.

The Wall Street Journal report (Exhibit "2") pleaded in the 6th Count has the lead caption:

"TWO MINORITY HOLDERS SUE, KIRBY, OTHER TOP OFFICERS OF ALLEGHANY

Suit Charges He gave R. Phillips Seat on I. D. S. Board. Got Favorable Settlement of '55 Suit

There follows a synopsis of what the *Freeman* suit charges and who are named as defendants. It goes on to quote both defendants—Ireland that the charges were ridiculous and a statement to the effect that he had been served and by Phillips that he had not been served and that he was not going to be intimidated or coerced from performing his duty in spite of the charges made against him; the report also quotes Murchison on charges of wrongdoing made against him by stockholders of I. D. S.

The report in the Herald Tribune ((Exhibit "3"), the 7th Count) bears the caption

"ALLEGHANY FACED BY NEW SUIT INTEREST CONFLICT CHARGE LEVELED."

and describes the suit as a battle between millionaires (Kirby and Murchison) for control of Alleghany; then quoting from the complaint it says that the suit charged that Kirby entered into a "secret agreement and conspiracy" with Phillips to procure favorable settlement of another suit in return for a promise to Phillips of "certain perquisites", among which were that Phillips would be named a director of I. D. S. with a salary and expense account. Under a subheading "Payment Held Inadequate" Phillips is quoted as saying that he had requested the removal of the Murchisons for wrongdoing, and that he would not be intimidated or coerced from performing his duties to the I. D. S. stockholders.

The press release ((Exhibit "5"), Count 9), bears the heading

> "FOR: MURCHISON BROTHERS FOR IMMEDIATE RELEASE: THURSDAY, SEPTEMBER 8, 1960"

and begins by stating that Murchison and others had charged defendants and Phillips with conspiracy to defraud the courts and Alleghany; it then continues with a summary of the complaint "filed in the United States Southern District Court", quoting from it that it alleges that Phillips was to receive "a position of prominence as a director or officer of I. D. S., ALLEGHANY or one of its affiliates,", adding in parentheses and not quoting that ("Phillips is now a director of I. D. S."). It also quotes from the complaint that he would be a "salaried consultant to Alleghany or one of its affiliates" and not quoting, in parentheses

("Phillips is now on the payroll of I. D. S. as a consultant at $2,500. monthly.").

The report in the World Telegram ((Exhibit "6"), Count 10) under the heading "MURCHISONS JOIN FIGHT FOR ALLEGHANY CONTROL" reports on the contest between the Murchisons and Kirby for control of Alleghany and describes very briefly the suits filed in the State and the Federal Courts saying that they charged that defendants Kirby, Ireland and Phillips "conspired to put over on the federal and state courts a fraudulent settlement" and that Kirby "made a secret agreement to reward Phillips with a directorship and a job".

The report in the New York Times ((Exhibit "7"), Count 10) under the caption

> TWO ADDITIONAL LAWSUITS FILED AGAINST OFFICIALS OF ALLEGHANY

is even briefer; it summarizes the two complaints as charging "a secret agreement and conspiracy" among the three defendants and a "fraud on the courts" in a "secret agreement between Phillips and Kirby."

The report of the Minneapolis Morning Tribune ((Exhibit "8"), Count 11) carries the by-line

> MURCHISONS CHARGE CONSPIRACY IN ALLEGHANY CORP. SETTLEMENT

and among paraphrases of the allegations of the complaint makes the following statements of plaintiff describing him as "a leader in the suits against the management of Alleghany" and since the settlement "active in Alleghany af-

fairs," "a director of IDS * * * and chairman of the IDS law and finance committee" and "a leader in the recent shakeup of the management of IDS". It further quotes from the complaint that "Phillips in collaboration with Ireland was to use the position created for him in Alleghany or I. D. S. to harass and discourage any opposition to Kirby within the management or among the stockholders of I. D. S.," and that "Phillips now is receiving $2,500. a month from I. D. S. for services as a consultant."

A comparison of paragraphs of the complaints with the reports leaves no doubt that far from imputing greater turpitude to plaintiff than do the judicial proceedings, they are very restrained in accurately summarizing the content of these proceedings. The emphasis is on Kirby and Murchison, rather than on Phillips, who is made to appear as a weapon in the hands of Kirby in his battle against Murchison, which had for long occupied the attention of the press and the public. The language travels very closely on the language of the complaints and where it does not there are no words used which might be susceptible of charging plaintiff with greater wrongdoing than do the complaints.

Plaintiff really does not dispute the fairness and truthfulness of the language used, but rather relies on legal arguments to destroy privilege. Thus, he says that the language of the press release is not privileged because it contains factual statements which are not reported as allegations of the complaints, and he points to the language found in parentheses in the press release.

There are two answers to this argument—one is that although not reported as a charge in the complaint, these two statements were in fact allegations of the complaints,

and the second is, that even if they were not, if they were true and not in themselves libelous they would not destroy the privilege. That a statement of fact is interspersed among a report of judicial proceedings does not deprive the report of the protection of the statute so long as the statement does not affect its truthfulness or fairness (Briarcliff L. Hotel v. Citizen-Sentinel Publishers, 260 N. Y. 106, 183 N. E. 193). So too, the headings or lead lines of the reports themselves are protected if they are fair and true headnotes of the statements published. Here, the headings are no more than an index of what appears in the context below; and only one refers to plaintiff! The Wall Street Journal states that Kirby is charged with having given plaintiff a seat on the I. D. S. Board and with having obtained a favorable settlement of the stockholders' suit. Nothing could be a more accurate or fairer summary of what was charged in the complaints.

Plaintiff's other argument is that the privilege is defeasible because defendant failed to publish his subsequent vindication, and that the report therefore was not full, fair or impartial.

The report here was co-extensive with the judicial proceeding—only the complaints were then in existence and that is what was reported. It was as complete as could be and that is when the privilege attached, not years later; it was not destroyed because the charges ultimately were not sustained. Dismissal of the charges did not render the charges in the complaint non-existent as a record in a judicial proceeding. George v. Time, Inc., supra; Campbell v. New York Evening Post, supra. There is no principle

of law which so eradicates the privilege which has attached because of subsequent events.

Plaintiff's next argument is undeserving of much comment. If the report is privileged because made in connection with a judicial proceeding, it matters not what its source is. The report determines the privilege, not its source, so that it is immaterial whether the newspapers (who are not the defendants here) obtained their information directly from the complaints. Murchison, the defendant, and his agent obviously did obtain the information from that source.

Plaintiff finally urges that the privilege does not apply to the Murchison action because the publication was by Murchison a party to the complaint. But, the statute immunizes "any person" including parties to the litigation (Lewis v. Chemical Foundation, 262 N. Y. 489, 188 N. E. 33; Robinson v. Battle, 148 App. Div. 230, 133 N. Y. S. 57; Oglesby v. Cranwell, 250 A. D. 720, 293 N. Y. S. 67).

Reaching at long last Count 12, it is clear that the mailing of the copies of the complaint by Murchison to his fellow directors was on September 13, 1960 long after its filing was completely privileged as a publication of a judicial proceeding. No question of fairness or truth is presented here since the publication was of the complaint itself. Plaintiff has again argued that the Civil Rights Law of New York does not apply to the out of state publications alleged in the 11th and 12th Counts. This was an argument raised before Judge Dawson in support of plaintiff's prior motion to strike the defense of privilege under New York law, and rejected by Judge Dawson on defendant's allegation that the judicial proceedings were pending here, and

that the publications emanated from New York, where plaintiff was resident and where damage, if any, was inflicted. This is where the tort was committed, but even if it were not, the New York law would still apply as the place having the most significant relationship with the occurrence (Babcock v. Jackson, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279, 95 A. L. R. 2d 1; King v. Hildebrandt, 2 Cir., 331 F. 2d 476; Restatement of Conflicts, 2d Sec. 379(e)).

The motion to dismiss Counts 6, 7, 9, 10, 11 and 12 and to enter judgment for defendant is granted upon the complete defense at law that the alleged defamations were absolutely privileged. The Clerk is directed to enter judgment of dismissal of these remaining counts with costs and with prejudice;

So ordered.

Dated: New York, N. Y.
March 25, 1966

/s/ SYLVESTER J. RYAN
United States District Judge

—536—

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civil 713

RANDOLPH PHILLIPS,

Plaintiff,

—vs.—

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., individually and as persons doing business under the firm name and style of MURCHISON BROTHERS,

Defendants.

The defendant John D. Murchison, the only defendant having been served and having appeared in the above entitled action having moved for summary judgment pursuant to Rule 56 (b) Federal Rules of Civil Procedure to dismiss Counts 6, 7, 9, 10, 11 and 12 of the amended and supplemental complaint, the only remaining counts herein, and the plaintiff having moved for an order vacating the order of this Court dated May 8, 1964 with respect to the dismissal of Counts 1, 2, 3, 8, 13 and 14 of the amended and supplemental complaint, said motions having come on to be heard before the Honorable Sylvester J. Ryan, United States District Judge, and the Court thereafter having handed down its opinion filed on March 28th 1966 denying plaintiff's motion and granting the defendant's motion with prejudice and with costs, it is

Judgment

ORDERED, ADJUDGED and DECREED: That the defendant JOHN D. MURCHISON have judgment against the plaintiff RANDOLPH PHILLIPS dismissing the amended and supplemental complaint with prejudice and with costs.

Dated; New York, N. Y.
March 28, 1966

JOHN J. OLEAR, JR.
Clerk

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1032

RANDOLPH PHILLIPS,
Petitioner,

—against—

JOHN D. MURCHISON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Of Counsel

INDEX

	PAGE
QUESTION PRESENTED	1
STATEMENT	2
Petitioner's Four Complaints	2
THE DECISION OF THE SECOND CIRCUIT	3
The Majority's Rationale in Reversing The Dismissal of Counts 1, 2 and 12	4
The Unanimous Affirmance of The Dismissed Counts	5
ARGUMENT	7
I. The Petition For A Writ of Certiorari Is Premature	7
II. Petitioner's Constitutional Arguments Are Devoid of Merit	10
A. The Due Process and Equal Protection Claims	11
B. The Claim as to Freedom of Speech	12
C. Deprivation of a Remedy Claim	12
D. The Securities Exchange Act Claims	14
CONCLUSION	15

CITATIONS

CASES:

Alleghany Corporation (*Murchison*) v. *Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr. and Fred M. Kirby*, 60 Civ. 3511 (188a) 2

American Wells Works Co. v. *Layne & Bowler Co.*, 241 U. S. 257, 260 (1916) 11

PAGE

Appalachian Power Company v. *American Institute of Public Accountants*, 80 Sup. Ct. 16 (Memo not officially reported 1959) 8

Curtis Publishing Co. v. *Butts*, 388 U. S. 130, 152 (1957) 11

Hamilton-Brown Shoe Co. v. *Wolfe Bros. & Co.*, 240 U. S. 251, 258 (1916) 8

Linn v. *United Plant Guard Workers*, 383 U. S. 53 (1966) 13

Maryland v. *Baltimore Radio Show*, 338 U. S. 912, 918 (1950) 9

Missouri v. *Lewis*, 101 U. S. 22 (1880) 12

New York Times Co. v. *Sullivan*, 376 U. S. 254 (1964) 13, 14

Pennekamp v. *Florida*, 328 U. S. 331 (1964) 13

Rosenblatt v. *Baer*, 383 U. S. 75 (1966) 13, 14

Salsburg v. *Maryland*, 346 U. S. 545 (1954) 12

Sarelas v. *Sheehan*, 326 F. 2d 490; cert. den. 377 U. S. 932 (1964) 11

Time, Inc. v. *Hill*, 385 U. S. 374 (1966) 13

Toledo Scale Co. v. *Computing Scale Co.*, 261 U. S. 398, 481 (1923) 9

Williams v. *Williams*, 27 A. D. 2d 530 (2d Dept. 1966) 4

RELEVANT STATUTES:

New York Civil Practice Act § 337 (Now New York Civil Rights Law, § 74) 6

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1032

RANDOLPH PHILLIPS,
Petitioner,

—against—

JOHN D. MURCHISON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, John D. Murchison, submits this brief in opposition to the Petition for Certiorari of Randolph Phillips.

QUESTION PRESENTED

Respondent submits that this case raises no questions that warrant review by this Court. A brief statement of the proceedings below will demonstrate that the claimed "Constitutional" issues, so indefinitely stated in the Petition, are hallucinatory. Moreover, even if the issues did have substance, they are clearly not ripe for review at this stage of the litigation.

STATEMENT

Petitioner's Four Complaints

On February 24, 1961, petitioner commenced this action by way of an order to show cause why respondent's participation in a proxy contest involving Alleghany Corporation should not be enjoined. The original complaint contained no defamation count, and petitioner admitted that the action was commenced as a gambit in a proxy contest (186a-187a)*. After respondent filed extensive answering papers, petitioner, within a week withdrew his motion and then sought to withdraw his complaint, without prejudice (187a).

The Court below denied Mr. Phillips' effort at voluntary dismissal upon the ground, among others, that he would give no assurance that he would not turn around and start another action and again seek a similar preliminary injunction to halt the proxy contest (187a).

Thereafter, petitioner, as a matter of right, served an amended 53-page complaint (82a-143a) which reiterated the bulk of the original complaint and added a claim of libel against defendant. The action then was dormant for over a year and a half. Respondent then moved to dismiss for failure to prosecute. Petitioner, however, obtained a stay pending the determination of *Alleghany Corporation (Murchison)* v. *Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr. and Fred M. Kirby,* 60 Civ. 3511 (188a).

On October 11, 1963, after trial of the Alleghany litigation, respondent moved for summary judgment dismissing the derivative counts of the Amended Complaint and requiring petitioner to plead the one defamation count properly. Judge Dawson granted both branches of the motion on November 1, 1963, stating that the Complaint "is a long, rambling and confused document" (46a).

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*Parenthetical references followed by a lower case "a" refer to the appendices on appeal before the Court of Appeals. References prefixed by "Pet." refer to the Petition and appendices contained in the Petition before this Court.

On November 5, 1963, petitioner repleaded and served a Second Amended Complaint consisting of one count for defamation; his third in this action. It was dismissed on December 5, 1963, for failure to make it a short concise pleading in compliance with Federal Rule 8(e) (46a).

On January 28, 1964, petitioner served an Amended and Supplemental Complaint in his fourth attempt to plead a viable claim for relief. Instead of the one defamation count of his previous complaints there now appeared fourteen counts, not only for defamation but now also for the entirely new claims of abuse of process, malicious prosecution and "conspiracy". Judge Dawson on May 8, 1964, dismissed all counts except 6, 7, 9, 10, 11 and 12, which dealt solely with defamation (46a-56a). In so doing, Judge Dawson sharply criticized petitioner's prolix pleading and unwillingness to state his claim succinctly (46a-48a).

After respondent answered the Amended and Supplemental Complaint as curtailed by Judge Dawson (159a-171a), respondent moved for summary judgment on the remaining six defamation counts. Judge Ryan granted this motion on March 28, 1966, on the ground that the alleged defamations were privileged, under New York law, as fair and true reports of a judicial proceeding. As a result of these two decisions the entire complaint was dismissed and petitioner appealed to the Second Circuit the dismissal as to all counts except counts 4 and 5 (259a).

THE DECISION OF THE SECOND CIRCUIT

The appeal came on to be heard before the Court of Appeals for the Second Circuit on December 15, 1966, (Judges Waterman, Moore and Feinberg). On August 23, 1967, that court unanimously affirmed the dismissal of the complaint as to all counts except those numbered 1, 2 and 12; as to those a majority of the court voted for reversal (Pet. 1a-17a).

The Majority's Rationale in Reversing The Dismissal of Counts 1, 2 and 12

Counts 1 and 2 allege, respectively, a "conspiracy maliciously to use the process of this Court and the New York Supreme Court" and a "conspiracy to maliciously abuse the process" of those courts (5a-11a). Judge Dawson held that under New York law these counts did not state a claim for malicious prosecution or for abuse of process since petitioner had failed to allege either that his person or property had been interfered with in connection with the prior litigation or that special circumstances existed exempting his claim from that rule (Pet. 48a-49a).

Over the strong dissent of Moore, J., the Court of Appeals, reversed the dismissal of counts 1 and 2 relying principally upon the decision of the New York Appellate Division, Second Department, in *Williams* v. *Williams*, 27 A.D. 2d 530 (2d Dep't 1966), a 3-2 decision, which was not decided until after Judges Ryan and Dawson rendered their opinions on the two motions referred to above. The court interpreted *Williams* as upholding ". . . a complaint alleging that an action was instituted 'not with the intention of prosecuting it as a law suit but solely for the purpose of ruining plaintiff's business reputation' . . . despite the absence of any allegation of interference with plaintiff's person or property" (Pet. 4a-8a). It held, therefore, that if *Williams* is affirmed, petitioner's counts 1 and 2 would be properly pleaded.

At this point petitioner's distortion of what actually transpired below should be noted. Throughout his petition, petitioner tries to create the impression that the Second Circuit has deprived him of any remedy including one for malicious prosecution and abuse of process claims. Of course, the Second Circuit did precisely the opposite and petitioner has no complaint insofar as these theories of recovery are concerned and no basis for claiming he has been left without remedy.

Count 12 of the complaint alleges, *inter alia,* that respondent mailed copies of the complaint in an action commenced by him against petitioner directly to certain interested corporate directors in a number of states and Canada and that the allegations therein were "false, malicious and defamatory" (28a).

Judge Ryan held that under the law of New York such publication was privileged. In spite of its sustaining the privilege accorded to respondent's publications to the press (counts 6, 7, 9, 10 and 11) the Court of Appeals held that if *Williams* should be upheld by the New York Court of Appeals, the publication alleged in count 12 might no longer be privileged under New York law.*

None of the issues raised by the reinstatement of counts 1, 2 and 12 are presently before the Court, except that the existence of these counts in the litigation demonstrates that petitioner has not been unconstitutionally deprived of a "remedy", "due process" or the "equal protection of the laws".

The Unanimous Affirmance of the Dismissed Counts

Count 3 of the complaint purports to allege a conspiracy to violate Federal Civil Rule 11 relating to the signing and verification of pleadings. It was dismissed by Judge Dawson because it was not a "recognized tort" (Pet. 52a).**

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*The doubt cast upon the privilege arose from the *Williams* holding that when a law suit is begun solely to defame and with no intention to prosecute, a report of that suit to the press or to the public by way of the press is privileged, but a report directly to the public is not.

**The Enabling Act 28 USC § 2072 directs that the rules, as promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right". Hence to read Rule 11 as Petitioner desires would violate the Enabling Act by creating a civil action for breach of a Federal Rule of Civil Procedure. The sanctions set forth in Rule 11 such as dismissal are exclusive and there is no authority to the contrary.

Counts 8 and 13 purport to allege violations of the Securities Exchange Act and certain of its Rules and Regulations. They were dismissed by Judge Dawson because, to the extent petitioner's contentions could be comprehended he had alleged no facts sufficient to show any damage resulting to him personally by reason of the alleged violations (50a).

As to count 14, the Petition states that it "realleges all prior counts as a conspiracy" (Pet. 15). It was dismissed by Judge Dawson as unintelligible and legally insufficient, and it is. Lumping together thirteen previously pleaded claims, eleven of which fail to state a claim for relief and calling the hodgepodge a "conspiracy" adds nothing but confusion.

Counts 6, 7, 9, 10 and 11 each involved publications to the press. As to each, Judge Ryan held that the publications complained of were absolutely privileged under Section 337 of the New York Civil Practice Act (now New York Civil Rights Law § 74) which provides in relevant part:

> "A civil action cannot be maintained against *any* person, firm or corporation for the publication of a fair and true report of *any* judicial proceeding, legislative proceeding, or other official proceeding, or for any heading of the report which is a *fair* and *true* headnote of the statement published" (Emphasis supplied).

As noted in Judge Ryan's opinion, petitioner raised no question of fact in opposition to the summary judgment motion addresed to these allegations. As to each publication involved in these counts, Judge Ryan found that a judicial proceeding was pending at the time of publication and that each of the publications was a fair and true report of those proceedings (Pet. 57a-75a).

The dismissals of these counts presented the following questions to the Second Circuit: Was New York law cor-

rectly applied to the charges of malicious prosecution and abuse of process? Were the alleged libelous publications protected by the New York Statutory privilege? Were the attempts to plead claims for the same damages claimed elsewhere in the complaint by charging conspiracy under Rule 11 and libel under the Securities Exchange Act valid? In affirming these dismissals, no question for this Court was raised.

ARGUMENT

The unique "constitutional" issues conjured up by petitioner are made up of whole cloth. Even if such issues did exist, they are not yet ripe for determination by this Court.

I

THE PETITION FOR A WRIT OF CERTIORARI IS PREMATURE

The vigorousness with which petitioner has attacked the Court of Appeals' affirmance of the dismissed counts bears comparison with the manner in which petitioner has soft-pedaled the Court of Appeals' reversal of counts 1, 2 and 12. Petitioner seeks to create the impression that he has been left without a remedy for the wrongs allegedly done him. Of course, this is simply not so because in the remaining three counts for malicious prosecution, malicious abuse of process and defamation, petitioner seeks to recover the same damages he sought for the same basic wrongs alleged in the dismissed counts.

This point is stressed, not because respondent agrees that the reversal below was correct (respondent position is, of course, to the contrary) but because it bears directly on whether the issues raised in the petition warrant review by the Court at this time. We submit they do not.

If anything is clear from the record below, it is that petitioner is seeking review of a merely interlocutory decree

or order of the Court of Appeals. Because of the viability of counts 1, 2 and 12, there has been no complete or final resolution of petitioner's suit. This Court has often said that the fact a petition seeks to review an interlocutory order or judgment is by itself sufficient ground to deny a writ and that "except in extraordinary circumstances the writ is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258 (1916); *Appalachian Power Company* v. *American Institute of Public Accountants*, 80 Sup. Ct. 16 (Memo, not officially reported, 1959).

On remand from the Court of Appeals, if petitioner is successful on any one of the remaining counts, there will be nothing for this Court to review. If, however, he does not succeed at trial, after appeal to the Second Circuit he will be free to re-petition this Court for a writ of certiorari seeking review of the interlocutory as well as the final decree of the court below. Denial of a writ now, will not deprive him of that right in the future. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co., supra.*

Hamilton-Brown is strikingly similar to the instant case. There plaintiff brought an action for trademark infringement and unfair competition. On appeal from a dismissal of the complaint the Court of Appeals affirmed as to the dismissal of the trademark cause of action but reversed the dismissal of the unfair competition count and directed that an injunction be issued and an accounting had. Plaintiff's petition for a writ of certiorari was denied. On remand the district court rejected the master's report on the accounting, which had recommended a substantial judgment for plaintiff, and awarded plaintiff only nominal damages. Plaintiff appealed a second time and the Court of Appeals reversed, directing that the master's report be confirmed. Defendant then petitioned for certiorari, which was granted.

In response to petitioner's contention that this Court could not review the dismissal of the trademark cause of action, which had been affirmed by the Court of Appeals and with respect to which the previous petition for certiorari had been denied, this Court stated:

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings. [Citations omitted]."

See also *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 398, 418 (1923).

It can be seen, therefore, that the present petition for a writ of certiorari is a needless imposition on this Court's time and patently unnecessary in view of the interlocutory nature of the decision below.

Moreover, both Judges Dawson and Ryan recognized the confused state of the present record, created solely by petitioner's unintelligible pleading. In his separate opinion in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918 (1950), Mr. Justice Frankfurter expressed the desirability of avoiding review where, as here, the record is cloudy and there is a need to have the issues further illuminated. The alleged constitutional issues are so intricately interwoven with petitioner's gross defects in pleading that a herculean effort would be required to recognize and isolate them.

It should also be noted that although the Second Circuit based its reversal as to three counts on *Williams,* it explicitly recognized that its estimate of New York law might prove incorrect in light of further action in that case by New York's highest court.* It, therefore, recommended that trial of those reversed counts should await the outcome of the *Williams* appeal. While it is clear that an affirmance of *Williams* cannot possibly affect the dismissals of the counts which are the subject of the petition, it is not at all clear that a reversal of that case will not supply additional reasons why these dismissals were proper. This, of course, is just a further indication that the issues raised in the petition are not now ripe for meaningful determination by this Court.

II

PETITIONER'S CONSTITUTIONAL ARGUMENTS ARE DEVOID OF MERIT

Like the complaint, petitioner's constitutional arguments are long, repetitive, confused and, therefore, difficult to comprehend or answer intelligently. At best they amount to advocatory self-levitation without even aid of the proverbial boot straps. To the extent that petitioner's arguments are comprehensible, we now attempt to answer them.

While there is considerable overlapping in petitioner's Questions Presented, they can be generally broken down into four categories namely, that petitioner (a) has been subjected to "unequal 'due process of law' "; (Question 1); (b) that the right to free speech is somehow involved (Question 2); (c) that petitioner has been "unconstitutionally" deprived of a remedy for "an injury recognized by the law" (Questions 4 through 7 and 10); and (d) that he has been deprived of a private right of action for libel

*The appeal in *Williams* is still pending.

under the Securities Exchange Act of 1934 (Questions 3, 8 and 9).

A. The Due Process and Equal Protection Claims.

The privilege granted to a fair and true report of a judicial proceeding has been recognized by this Court as designed to foster communication by and to the press and the public at large; it is almost universally recognized. See, *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 151-152 (1957). Additionally, the privilege promotes free access to courts as a method of settling grievances by restricting opportunity for recriminatory legal action by a defendant as exemplified by the present litigation.

Petitioner's first Question Presented and his subsequent argument (Pet. 2, 24-39), contends that the scope of the privilege to fairly and truly report a judicial proceeding varies among the states and that it is broader in New York than in other jurisdictions (Pet. 24). From this premise petitioner reasons that the protection of law afforded him is unequal, since if he were in a different jurisdiction or if another state's law applied, some of his defamation counts might not have been dismissed (Pet. 25-28).

These arguments are so patently deficient that no extensive answer is required. The Fourteenth Amendment has never been held to guarantee uniformity of decisions among the states. See, *Sarelas* v. *Sheehan,* 326 F. 2d 490; cert. den. 377 U. S. 932 (1964). Under what circumstances a party may recover on theories of defamation is a matter in which the state is recognized as master, *American Wells Work Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 260 (1916); unless, of course, the state's law infringes upon the federal constitution's guarantee of freedom of speech—an issue which is certainly not raised by a statute which enlarges that freedom!

The mere fact that tort law and the remedies available for given acts vary from state to state does not by itself, give rise to a constitutional issue. *Missouri* v. *Lewis,* 101 U. S. 22 (1880). See also *Salsburg* v. *Maryland,* 346 U. S. 545 (1954).

Petitioner has not been subjected to any discriminatory application of, or variance in, the law. His sole complaint is that the lower courts' interpretation of New York law deprives him of certain alternative theories of liability for the alleged defamation. But this court has invariably recognized the expertise of the District and Circuit Courts on matters of local law—particularly where, as here, all judges were unanimous on the issues claimed to have been erroneously decided and none recognized the state law as raising a constitutional issue. See, *Appalachian Power Company* v. *American Institute of Public Accountants,* 80 Sup. Ct. 16 (Memo not officially reported; 1959).

B. The claim as to Freedom of Speech.

The second Question presented best illustrates the nature of petitioner's constitutional arguments. The Question talks of freedom of speech, but it is clear that all that is involved here is a statute which has *protected* the freedom of speech of its citizens. Hence, petitioner cannot claim that his freedom of speech has been jeopardized or is in issue (and he makes no such claim). Indeed, he cannot even claim that freedom of speech of respondent (which his suit attempts to limit) has been restricted by the decision below. In short, he cannot claim that the decision petitioned from raises an issue concerning the Constitutional protection of free speech.

C. Deprivation of a Remedy Claim.

It is difficult to categorize Questions 4 through 7 and 10. Like Questions 1 and 2, they are peppered with "due proc-

ess" and "constitutional protection" phrases and appear to be premised on this Court's holdings in *Time, Inc.* v. *Hill,* 385 U. S. 374 (1966); *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966); *Linn* v. *United Plant Guard Workers,* 383 U. S. 53 (1966); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964) and *Pennekamp* v. *Florida,* 328 U. S. 331 (1964).

Petitioner violently objects to the Court of Appeals' failure to deal with these cases in its opinion. This omission is understandable, however, for petitioner's reliance on these cases is totally misplaced.

The central theme of petitioner's contentions seems to be that the New York statute and the lower courts' application of it here, deprived him of some constitutionally guaranteed remedy for defamation. But these cases stand for the converse proposition, for in each of them this Court, acting in accordance with constitutional imperatives, actually restricted the remedies or damages that might otherwise be available to a litigant under state law.

In *Linn* this Court, in holding that the National Labor Relations Board did not have exclusive jurisdiction over a defamation action by an employer against a union, recognized that libel laws varied from state to state (*id.,* pp. 58-59), and consequently *limited* the availability of State remedies and the damages recoverable for libel to those instances where there was a showing of actual malice and damage, so that the States' interest in libel would not interfere with the effective administration of national labor policy which was designed to foster "freedom of speech" in labor disputes.

In *Rosenblatt* as in *Linn,* the Court *limited,* rather than enlarged, the right to recover for libel under state law. The Court specifically restricted the definition of "malice" and "public official" under New Hampshire law so as to make it *more difficult* for plaintiff to defeat the privilege of fair com-

ment under that State's law. In effect, it expanded the concept of freedom of speech and *added* to state law a "privilege" defense that did not previously exist under that State's law.

The quotation in *Rosenblatt* from this Court's decision in *Pennekamp* v. *Florida* (id., p. 84), so heavily relied upon by petitioner here, was actually an expression of this Court's concern that various state laws may infringe on the Constitutional protections afforded free expression, making it necessary for this Court to establish national Constitutionally-oriented guidelines to prevent such infringement.

In *New York Times, Inc.* v. *Sullivan,* the Court held "that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct" (*id.,* p. 283). By no stretch of the imagination could this holding support petitioner's contention that the courts below were under a Constitutional complusion to restrict or do away with the privilege of a true and fair report recognized under New York law.

Finally, *Time, Inc.* v. *Hill,* involved the "right of privacy" provisions of the New York Civil Rights Law (§§ 50 and 51). The Court reversed a decision of the New York Court of Appeals on the ground that its application of the statute to the facts in that case violated the Constitutional protection of freedom of speech and the press.

Petitioner's reliance on the foregoing cases as creating Constitutional issues which require resolution by this Court demonstrates better than anything else how illusory those issues are.

D. The Securities Exchange Act Claims.

As the opinion of Judge Dawson indicates, he encountered great difficulty in ascertaining what petitioner's conten-

tions were with reference to counts 8 and 13. Apparently the gravamen of these counts is that petitioner has been personally deprived of some sort of protection purportedly provided by the Securities and Exchange Act of 1934 and the proxy rules promulgated thereunder. The counts, however, are completely devoid of any hint as to just what personal rights petitioner claims the Act conferred upon him or sought to protect. He makes no allegation and no argument which would bring his own personal interest or any damage he claims to have suffered within the intended scope of the 1934 Act. He does not allege (1) that he had a direct stake in the proxy contest which was prejudiced by the alleged defamatory material, or (2) that his corporate franchise or those of other shareholders were impaired to his personal damage. He simply stated that "Rule X-14-9 . . ., among other features, is an anti-defamation statute". Neither Congress nor any Court has so stated.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petion for a writ of certiorari should be denied.

Respectfully submitted,

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February 16, 1968.